IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

ERNEST L. MONTANYE, Superintendent of Attica Correctional Facility and HAROLD SMITH, Deputy Superintendent of Attica Correctional Facility,

Petitioners,

against

RODNEY R. HAYMES,

Respondent.

MOTION FOR EXPEDITED CONSIDERATION OF PETITION AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1973

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ERNEST L. MONTANYE, Superintendent of Attica Correctional Facility and HAROLD SMITH, Deputy Superintendent of Attica Correctional Facility,

Petitioners,

against

RODNEY R. HAYMES,

Respondent.

MOTION FOR EXPEDITED CONSIDERATION OF PETITION

To: THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners respectfully move, on the grounds set forth below, for expedited consideration of the petition for a writ of certiorari herein, and if certiorari is granted, for expedited argument so that this case may be heard together with *Preiser* v. *Newkirk, cert. granted,* 43 U.S.L.W. 3223 (No. 74-107, October 21, 1974). The instant petition presents the question of whether a prison inmate who is transferred within a state from one maximum security institution to another maximum security institution, without the imposition of any disciplinary punishment, is entitled

under the Due Process Clause of the Fourteenth Amendment to notice of the reasons for the transfer and an opportunity to be heard.

Preiser v. *Newkirk* involves a similar question concerning the intrastate transfer of an inmate from a medium security institution to a maximum security institution. Heard together these two cases will present to this Court the two common types of intrastate transfers which have been the basis for conflicting decisions in the federal courts on the issue of the process due to the inmate being transferred (*post* at 8-10). Insofar as the federal courts have differentiated between transfers at the same custody level and those which alter custody classification, these two cases will provide the Court with an opportunity to rule on these two situations.

WHEREFORE, petitioners respectfully request that this Court expedite consideration of the within petition for a writ of certiorari, and if the petition be granted, expedite argument so that the case may be heard together with *Preiser* v. *Newkirk*.

Dated: New York, New York
October 31, 1974.

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IN THE

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No.

ERNEST L. MONTANYE, Superintendent of Attica Correctional Facility and HAROLD SMITH, Deputy Superintendent of Attica Correctional Facility,

Petitioners,

against

RODNEY R. HAYMES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Ernest Montanye, former Superintendent of Attica Correctional Facility and Harold Smith, former Deputy Superintendent of Attica Correctional Facility, pray for a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. Rodney R. Haymes* v. *Montanye*, which was decided on October 4, 1974. The decision reversed an order of the United States District Court for the Western District of New York, dated June 4, 1973, dismissing the complaint in a civil rights action brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343.*

* Although the case was captioned as a habeas corpus proceeding in the lower courts, it has been treated throughout as a civil rights action.

Opinions Below

The decision of the Court of Appeals is not yet reported and is reproduced herein as Appendix "A". The decision of the District Court is not yet reported and is reproduced herein as Appendix "B".

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on October 4, 1974.

Question Presented

Whether a prison inmate who is transferred within a state from one maximum security institution to another maximum security institution, without the imposition of disciplinary punishment, is entitled under the Due Process Clause of the Fourteenth Amendment to notice of the reasons for the transfer and an opportunity to be heard?

Statement of the Case

A. Facts

On June 7, 1972 respondent Rodney R. Haymes, a New York State inmate, was confined at the Attica Correctional Facility, Attica, New York. On the morning of June 7 Haymes was discharged from his job as an inmate law clerk in the Attica law library. During the afternoon of the same day, prison authorities took from Haymes a document which he was circulating among the inmates in a recreation yard at Attica.

In his complaint, Haymes himself denominated the document as a "legal petition" for the "redress of grievances." The writing, prepared by Haymes at the request of other

inmates, is addressed to Judge Curtin of the United States District Court for Western District of New York and is signed by 82 inmates, not including Haymes. The writing did not make a demand for relief but complained that the removal of Haymes and another inmate from their jobs as law clerks had deprived the signatories of legal assistance and access to the courts. It also complained of the allegedly obstructionist attitude of the correction officers in charge of the law library.

The confiscation of the document was based on paragraph 21 of the Inmates Rule Book, which states:

> "21. Inmates are prohibited except upon approval of the Warden, to assist other inmates in the preparation of legal papers."

Haymes had not requested permission to circulate the document nor had any inmates requested that he be permitted to assist them. Although the document was confiscated by the prison authorities, Haymes was not disciplined in connection with the incident.

On June 9, 1972 Haymes was transferred from Attica Correctional Facility to Clinton Correctional Facility. Both of these facilities are maximum security institutions within the State of New York. Haymes was not subjected to any disciplinary action or punitive confinement upon his arrival at Clinton.

B. Prior Proceedings

Haymes commenced this action in the United States District Court for the Western District of New York. He alleged that his transfer was in retaliation for his disobedience to the legal assistance rule and violated his right to due process since he was not given a hearing. Haymes also claimed that the petition was special correspondence, protected by the Department's own rules, which could not

be confiscated.* He did not seek equitable relief but requested $1,500 in compensatory damages and $1,500 in punitive damages.

Affidavits from petitioner Smith and the correction officer in charge of the law library were submitted to explain Haymes' discharge and the confiscation of the document. Petitioner Smith relied on the legal assistance rule in the prison rule book (*ante* at 5) as well as a notice posted in the cell blocks which stated, *inter alia:* "Under no circumstances are inmates to set themselves up as 'legal counselors' and receive pay for their services." Smith also stated that Haymes had been cautioned on several occasions about rendering legal assistance to other inmates without their having requested assistance.

On June 4, 1973 the District Court dismissed the complaint. Since there was no allegation of harsher or substantially different conditions at Haymes' new place of confinement, the Court held that Haymes' summary transfer from one maximum security facility to another did not violate his rights (A. 15a-16a).** The Court upheld the confiscation of the petition as enforcement of a reasonable prison rule regulating inmate legal assistance (A. 14a-15a). As the Court aptly noted, the confiscation in no way infringed *Haymes'* right to communicate with the court or counsel (A. 15a).

Haymes appealed the order dismissing his complaint to the Court of Appeals for the Second Circuit. On October 4, 1974 the Court of Appeals reversed the order of dismissal. The Court rejected the lower court's holding that a transfer between two maximum security institutions with similar programs was insufficient to warrant a hearing, irrespective

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* Department of Correctional Services' Administrative Bulletin #20 states that letters to public officials will not be read or censored.

** All numbers in parentheses preceded by the letter "A" refer to the Appendices herein.

of the motive for the transfer. The Court held that Haymes must be given an opportunity in court to prove that the transfer was punitive and that he suffered adverse consequences as a result of the transfer (5a-10a).

The Court stated that a transfer intended as punishment requires a hearing to ascertain the facts upon which the intended punishment is predicated, to assess the effect of the transfer on the inmate's future incarceration, and to give the inmate "a satisfactory opportunity to establish that he is not deserving of such handling" (A. 7a).* The absence of such a hearing, however, would not establish a violation of an inmate's constitutional rights unless he could also prove that the transfer had sufficiently adverse consequences so that the move could be characterized as punitive (A. 9a).

The Court stated that the maximum security classification of the two institutions was not dispositive and that the "hardship involved in the mere fact of dislocation may be sufficient to render Haymes' summary transfer—if a trial establishes that it was punitive—a denial of due process" (A. 10a). The Court then enumerated several possible consequences which might result from a transfer, including distance from family and counsel; removal from his friends; the possibility of property loss during the move; interruption of programs; and possible adverse inferences which might be drawn by the Parole Board from the transfer notation on the inmate's record (A. 10a-11a).

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* Although the Court did not state that notice of the reasons for the transfer was required, such a requirement may be inferred from the opinion. Since the Court held, in effect, that Haymes was entitled to the same due process before a punitive transfer as would be required for punishment within the facility, notice of the reasons for the transfer would be mandated. In discussing non-punitive transfers, the Court said "the decision whether to transfer may not be advanced in any way by providing notice and a hearing to the transferee" (A. 6a).

Having decided that Haymes was entitled to an opportunity to prove that the transfer was punitive and its consequences adverse, the Court of Appeals did not reach the issue of whether the confiscated petition was special correspondence protected by Administrative Bulletin # 20. The Court noted however that the characterization of the document as a letter and the fact that it demanded no relief would not automatically withdraw its circulation from the category of assistance prohibited by the prison's legal assistance rule (A. 11a-12a).

Reasons for Granting the Petition for Certiorari

This Court should decide whether an inmate transferred within a state from one maximum security institution to another maximum security institution, without the imposition of disciplinary punishment, is entitled to notice and a hearing under the Due Process Clause.

On October 2, 1974 this Court granted the petition for certiorari in *Preiser* v. *Newkirk,* 43 U.S.L.W. 3223. The question presented in *Preiser* v. *Newkirk* [hereinafter *Newkirk*] is similar to that raised in the instant case except that *Newkirk* involves a transfer to higher security institutions while the case at bar concerns a transfer between two institutions of the same security classification.

The question of whether prisoners who are transferred between penal institutions are entitled to some form of due process procedures is one which has divided the lower federal courts in this country. Some courts have held that such transfers, whether interstate or intrastate, require no due process while others have held that such transfer must be accompanied by due process guarantees. The latter decisions have varied as to the procedural elements necessary to meet the due process requirement. Some of the courts have distinguished between transfers which entail a change in security or custody classification, like

Newkirk, as opposed to those which involve no change in security level, like the case at bar. By granting the petition for certiorari in *Newkirk,* this Court has recognized the need for resolving this troubling area of the law.

Those decisions involving the intrastate transfer of prisoners have produced conflicting results. In *Schumate* v. *People of the State of New York,* 373 F. Supp. 1166 (S.D.N.Y. 1974) and *Beatham* v. *Manson,* 369 F. Supp. 783 (D. Conn. 1973), two courts in the Second Circuit held that transfers between state institutions did not require due process procedures unless there was an adverse change in custody level. The plaintiff in *Schumate* was moved from one maximum security facility to another, like the respondent in the instant case. The plaintiff in *Beatham* was transferred from a higher to lesser security institution. In *Benfield* v. *Bounds,* 363 F. Supp. 160 (E.D.N.C. 1973), the Court held that a transfer between state penal institutions was entirely a matter of administrative discretion. The *Benfield* plaintiff was transferred from one medium custody facility to another. In *Bundy* v. *Cannon,* 328 F. Supp. 165 (D. Md. 1971), the Court held that transfers between institutions of different custody levels required no hearings, although placement in segregation at the receiving institution created the need for due process procedures. In *Gray* v. *Creamer,* 465 F. 2d 179 (3rd Cir. 1972), the Court found no merit to a complaint alleging a summary transfer since a state prisoner has no constitutional right to remain in any particular prison.

Other courts considering intrastate transfers have mandated some due process when the character of the institution has changed. *Newkirk* v. *Butler,* 499 F.2d 1214 (2d Cir. 1974), *cert. granted sub nom. Preiser* v. *Newkirk,* 43 U.S.L.W. 3223 (No. 74-107, October 21, 1974) [medium to maximum security facility]; *Stone* v. *Egeler,* 377 F. Supp. 115 (W.D. Mich. 1973) [change of custody level plus distance of new institution]; *White* v. *Gilman,* 360 F. Supp.

64 (S.D. Iowa 1973) [reformatory to long term adult prison]. See *Clonce* v. *Richardson,* 379 F. Supp. 338 (W.D. Mo. 1974) [segregated confinement to behavior modification program]. In *Aikens* v. *Lash,* 371 F. Supp. 482 (N.D. Ind. 1974), the Court held that state inmates who were transferred from a reformatory to a penitentiary and routinely placed in punitive segregation at the penitentiaries were entitled to due process hearings.*

Those cases involving interstate transfers of state and federal prisoners have been equally inconsistent. Some courts have held that inmates who are transferred between states have no right to due process procedures, *Fajeriak* v. *McGinnis,* 493 F. 2d 468 (9th Cir. 1974); *Hillen* v. *Director,* 455 F. 2d 516 (9th Cir. 1972), *cert. denied* 409 U.S. 989 (1972), even if the transfer is to an institution of a stricter security classification. *Batchelder* v. *Kenton,* —— F. Supp. ——, 3 Prison L. Rptr. 93 (C. D. Cal. 1974).

Some courts considering interstate transfers have required full due process procedures including notice, an opportunity to be heard and to confront adverse witnesses, representation by a law advocate, a record of the proceedings, and review. *Kessler* v. *Cupp,* 372 F. Supp. 76 (D. Ore. 1973); *Ault* v. *Holmes,* 369 F. Supp. 288 (W.D. Ky. 1973); *Hoitt* v. *Vitek,* 361 F. Supp. 1238 (D.N.H. 1973). Other courts have mandated less extensive due process procedures. E.g. *Gomes* v. *Travisono,* 490 F. 2d 1209 (1st Cir. 1973), vacated and remanded, —— U.S. ——, 42 U.S.L.W. 3709 (July 8, 1974); *Croom* v. *Manson,* 367 F. Supp. 586 (D. Conn. 1973); *Park* v. *Thompson,* 356 F. Supp.

* Those cases concerning federal prisoners have been no more consistent. In *United States ex rel. Gallagher* v. *Daggett,* 326 F. Supp. 387 (D. Minn. 1971), an inmate challenged his transfer to a higher security prison. The Court held that the transfer was not subject to judicial review. In *Walker* v. *Hughes,* 375 F. Supp. 708 E.D. Mich. 1974), the Court held that due process was required before transferring an inmate from a medium, young offender institution to a maximum, adult facility.

783 (D. Ha. 1973); *Capitan* v. *Cupp,* 356 F. Supp. 302 (D. Ore. 1972).

It is apparent from these conflicting decisions that this Court should resolve the transfer issue at the earliest possible date for the benefit of prison inmates as well as prison administrators, who rely on transfers as one of the primary management tools for the protection and rehabilitation of inmates. In addition this Court should resolve the legal issue at the heart of the transfer cases, that is, whether the Due Process Clause applies to all losses of privilege and all deprivations that are suffered by an inmate during the course of his confinement.

It is undisputed that Haymes suffered no disciplinary punishment, special confinement, or loss of good time as a result of his violation of the Attica legal assistance rule, either at Attica or Clinton. Nor was he subjected to any disciplinary action as a result of his transfer, such as punitive segregation at the receiving institution. The court below based its ruling on the need for a hearing when a transfer is punitive and when the consequences of the transfer are sufficiently adverse to be characterized as punitive. These suggested guidelines are vague and unworkable criteria to determine when due process is owed to an inmate being transferred. In addition, they are inconsistent with the Court of Appeals' prior decision in *Newkirk.*

In *Newkirk* the Court of Appeals specifically rejected classification by label (e.g. "administrative" or "disciplinary") as the criterion for determining what process is due the transferred inmate. Rather, the Court there held that the determinative factor in determining due process is the loss suffered as a result of the transfer. The loss must be a "very real" and "substantial" loss to invoke a notice and hearing. Thus, the State may not defeat an inmate's right to due process by labeling his transfer nonpunitive.

Now, by its decision in the instant case, the Court has apparently held that the inmate himself may classify by label, that is, an inmate who merely alleges that a summary transfer was punitive must now be given an opportunity in court to prove that allegation and the adverse consequences of the transfer. Conceivably such an allegation will be made by any inmate who finds a transfer undesirable and seeks readmission to the transferring institution. Given the exigencies of prison life, an inmate is likely to find some incident or reprimand in the weeks immediately preceding the transfer, for which he may not even have been disciplined, and claim that the transfer was intended to punish him for that incident, minor as it may have been. A further difficulty with allowing such classification by the inmate is illustrated by the situation wherein a transfer is made in consequence of a review of an inmate's entire correctional record with a resulting decision that a program transfer is in order for rehabilitative purposes. The review may be triggered by a rule violation for which the inmate has already been disciplined. If the program transfer occurs on the heels of the rule violation, an inmate may now characterize the transfer as punitive and must be given his day in court. The correctional authorities must then appear to justify their decision to transfer as one based on the rehabilitative factors which are often utilized to transfer inmates.

Moreover, the Court of Appeals has apparently abandoned the *Newkirk* holding that due process is invoked when an inmate suffers a *substantial* loss as a result of the transfer. It was not a mere transfer which entitled Newkirk to notice and a hearing, but a change of custody transfer which involved deprivations of favorable living conditions and employment and training opportunities. However, in the instant case the Court stated that the "hardship involved in the mere fact of dislocation may be sufficient to render Haymes' summary transfer—if a trial

establishes that it was punitive—a denial of due process" (A. 10a). Although Haymes had never claimed that he was subjected to adverse consequences as a result of the transfer, the Court proceeded to suggest what these factors might be. They included distance from family, possible loss of property, interruption of programs, loss of friends, administrative segregation at the receiving facility, difficulty in contacting counsel, and the necessity to make an adjustment to a new environment.

The Court of Appeals for the Second Circuit is the only court which has held that a transfer between two intrastate correctional facilities of the same security classification and similar character, without the imposition of disciplinary punishment, may be a sufficiently substantial deprivation to invoke due process. Petitioners submit that such a transfer is not a very real or substantial loss in the constitutional sense of those terms and does not call for the due process procedures mandated by the Court of Appeals. The consequences of such a transfer are those suffered by every inmate who is transferred; they are in no way peculiar to an inmate who claims that his transfer was punitive. All of the courts which have considered transfers between institutions of the same custody level have specifically held that a summary transfer in that situation is not a violation of the inmate's constitutional right. E.g. *Schumate* v. *People of the State of New York, supra; Benfield* v. *Bounds, supra.*

The transfer cases in the federal courts which have mandated due process hearings (*ante* at 9-10) fall into two categories—those which require due process because the transfer is to an institution of a stricter security level, and those which require due process because the transfer is interstate. The rationale on which the courts have relied to mandate due process in these two categories has no application to the situation of an intrastate transfer between two facilities of the same security classification.

When an inmate is transferred to an institution of a stricter security classification he may lose certain privileges which he enjoyed at the prior institution. E.g. *Newkirk* v. *Butler, supra; Walker* v. *Hughes, supra; White* v. *Gilman, supra. Preiser* v. *Newkirk* will explore whether this loss is sufficiently grievous to invoke the due process clause. When an inmate is transferred to another institution of the same character and security classification, this factor is obviously lacking. The program opportunities and freedom of movement are essentially the same at the receiving institution as they were at the sending institution, and the diminution of privileges even less severe than the *Newkirk* situation.

These cases involving out of state transfers have stressed transfer consequences far more serious than those which occur in an intrastate transfer. These include the failure to supply records with resulting programs and treatment inconsistent with prior rehabilitation; serious problems of orientation in a totally new (that is, different state or federal) penal environment; lengthy administrative or quarantine segregation; failure to forward medical and psychiatric records with consequential denial of treatment; and the likelihood of a transfer to an institution a *great* distance from the sending facility. E.g. *Gomes* v. *Travisono, supra; Croom* v. *Manson, supra; Hoitt* v. *Vitek, supra.* When a transfer is made between two institutions in the same state these factors are absent and the rationale underlying the interstate transfer cases cannot be applied to the instant situation.

While not denying that an inmate may suffer some dislocation as a result of an intrastate transfer between two institutions of the same security classification, petitioners submit that the consequences of such a transfer are insufficient to be deemed a substantial deprivation in a legal sense or to invoke the Due Process Clause. In *Wolff* v. *McDonnell,* —— U.S. ——, 42 U.S.L.W. 5190 (June 24,

1974), this Court drew a distinction between the due process owed to a parolee facing revocation and an inmate facing disciplinary punishment within a prison, affording the latter less protection under the Due Process Clause. This Court also noted that the process due when an inmate faced good-time forfeiture or solitary confinement would not apply to situations in which lesser penalties were to be imposed. 42 U.S.L.W. at 5200, n. 19.

An inmate who is summarily transferred without the imposition of disciplinary punishment may suffer fewer deprivations in a legal sense than a prisoner summarily transferred for disciplinary reasons and placed in solitary confinement at the receiving institution. Likewise, an inmate transferred within a state to an institution of the same security classification may not suffer the same deprivations that are suffered by an inmate who is transferred out of state or to a stricter security facility. The instant case provides this Court with another opportunity to clarify the due process rights of inmates in these varying situations, particularly when the transfer is between institutions of the same custody level.

In light of the widespread and serious division of the lower federal courts on the rights of transferred prisoners; in light of a Court of Appeals' decision which fails to establish workable guidelines for its ruling; in light of the Court of Appeals' apparent conflict with its earlier holdings in *Newkirk,* and in light of this Court's grant of certiorari in *Preiser* v. *Newkirk,* petitioners believe that their application for certiorari should be granted in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
October 31, 1974.

Respectfully submitted,

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Appendix A.

Decision of the United States Court of Appeals for the Second Circuit, dated October 4, 1974.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 20—September Term, 1974

(Argued September 13, 1974 Decided October 4, 1974)

Docket No. 74-1208

UNITED STATES OF AMERICA ex rel. RODNEY R. HAYMES,
Petitioner-Appellant,
against

ERNEST L. MONTANYE, Superintendent, Attica Correctional Facility, ... Smith, Deputy Superintendent, Attica Correctional Facility,
Respondents-Appellees.

Before: KAUFMAN, *Chief Judge,* SMITH and TIMBERS, *Circuit Judges.*

KAUFMAN, *Chief Judge:*

It is clear beyond cavil that American prisons have failed dismally to fulfill the ambition of contemporary penologists that prisoners should be treated and rehabilitated. Although it is impossible to deny that many are sentenced to prison as punishment, however, we cannot condone the idea

that the mere fact of incarceration permits a prisoner to be punished at the whim of those charged with his confinement. Rodney Haymes, formerly an inmate at New York's Attica Correctional Facility, initiated this § 1983 action seeking damages for the confiscation of a "legal petition" which he circulated while in custody there, and for his alleged summary punishment two days later by transfer without a hearing to the Clinton Correctional Facility. We reverse the summary judgment dismissing his complaint.

A brief recitation of the facts will aid in framing the issues we are called upon to decide. Haymes was discharged as inmate law clerk in Attica's law library on the morning of June 7, 1972. During the afternoon of that same day, prison authorities seized from Haymes a document which he was circulating among the inmates in the "A" block recreational yard. The writing, prepared by Haymes at the request of other prisoners and signed by 82 inmates, was addressed to Judge Curtin of the United States District Court for the Western District of New York. Although it requested no relief, the petition stated that the signatories were being deprived of legal assistance because of the removal of Haymes and John Washington, another inmate law clerk, from the library. The document charged that law library officer Edward Brady went "out of his way to circumvent inmates legal assistance." It also alleged this to be the reason for the removal of Haymes and Washington from their positions in the library.

Although no explanation for the confiscation was given at the time, Deputy Superintendent Harold Smith stated in an affidavit submitted in response to Haymes' complaint that the papers were seized because Haymes had not asked permission to circulate them, and none of the signers had requested legal assistance, despite the provision of Rule 21

of the Inmate's Rule Book:

> 21. Inmates are prohibited, except upon approval of the Warden, to assist other inmates in the preparation of legal papers.

While there is some question whether Rule 21 was in fact widely circulated,[1] Smith stated that Haymes had been cautioned on several occasions not to assist other inmates who had not requested and received approval. A notice from former Superintendent Montanye, posted on the cell block bulletin boards April 25, 1972, also stated:

> In all instances where inmates desire assistance in the use of the law Library, they are to present their problems to Correction Officer Brady, who will assist them to the extent necessary or will assign inmates on the Law Library staff to particular cases.
>
> Under no circumstances are inmates to set themselves up as "legal counselors" and receive pay for their services.

Haymes protested the confiscation, asserting that the petition was protected as a special letter under Administrative Bulletin #20, which provides:

> 9. Special correspondence to public officials: You may write to the President of the United States, Members of Congress, . . . and to any Judge. . . . The letter will not be read or censored.[2]

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[1] Haymes stated in his affidavit submitted to the district court that he had never been given a rule book, nor had one been published since 1969.

[2] N.Y. Dep't of Correction, Administrative Bull. No. 20, Jan. 31, 1972. The Bulletin was published shortly after this court decided, in *Sostre* v. *McGinnis*, 442 F.2d 178, 200 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 *and* 405 U.S. 978 (1972), that censorship of inmate letters to courts, lawyers and public officials violated the first amendment rights of prisoners.

The real impact of the events leading to the seizure was felt when, two days later, on July 9, 1972, Haymes was transferred without a hearing from Attica to the Clinton Correctional Facility. Although both institutions are maximum security facilities, Clinton is several hundred miles farther away from Haymes' home in Buffalo. After his transfer, Haymes wrote twice to Superintendent Montanye protesting the confiscation of the papers and requesting their return. He received no response.

Haymes then began this § 1983 action,[3] alleging that his transfer without hearing to Clinton, in retaliation for his disobedience of Rule 21, deprived him of due process. His complaint also alleged that the petition being circulated was not "legal assistance" but "special correspondence" protected by Administrative Bulletin #20, and that its confiscation was therefore improper. He sought $1500 in compensatory damages for the time he was deprived of the document, and $1500 punitive damages "for the various acts of reprisals taken against" him. Haymes thereafter retained counsel. After considering affidavits and exhibits submitted to him, the judge, on Montanye's motion, "dismissed" Haymes's "application for relief under the Civil Rights Act." Since there is no indication that Judge Curtin found Haymes's claims to be frivolous, *see* 28 U.S.C. § 1915 (d), and because he considered matters outside the pleadings, *see* F.R.Civ.P. 12 (b), his disposition perforce was summary judgment. F.R.Civ.P. 56. Judge Curtin held that the seizure of the document, because it represented unauthorized legal assistance, was proper under Rule 21. He also found no violation of due process in Haymes's transfer. In effect, therefore, Judge

[3] 42 U.S.C. § 1983 (1970). Although the case has been characterized throughout as a habeas corpus proceeding, the district court properly treated it from the outset as an action under the Civil Rights statute.

Curtin decided that the alleged punitive nature of the transfer was not material. The district judge reasoned that, because no claim was made that "the facilities at Green Haven [sic] are harsher or substantially different from those afforded to petitioner at Attica," the defendants were entitled to judgment as a matter of law.

It is black letter law that the issue on an appeal from a summary judgment is whether the pleadings, affidavits, and other papers before the district court show a "genuine issue as to [some] material fact," requiring a trial, F.R.Civ.P. 56 (c). Haymes claims that the circumstances of his transfer raise two such issues: whether he was moved to Clinton Correctional Facility as punishment for his disobedience of prison rules and policies, and whether the effects of transfer were sufficiently harsh to make denial of a hearing a violation of due process. If the district court had permitted him to establish a punitive animus behind his transfer, the argument proceeds, he would not have been required to establish that Clinton's facilities were "substantially different" from those at Attica. Rather, Haymes argues, implicit in the very fact of his dislocation are deprivations at least as severe as those which may be imposed as punishment pursuant to the New York Correctional Rules and Regulations. Since some form of hearing is required before a misbehaving inmate can be made to suffer the specified sanctions, summary transfer for similar misbehavior may amount to a denial of due process. We see merit in this contention.

I.

We find it difficult, in the absence of a trial record, to look upon the circumstances of the transfer as a mere coincidence. The papers reveal that less than forty-eight hours after Haymes was ordered to cease collecting signatures without permission in the recreation yard, he was

shipped to the Clinton Correctional Facility hundreds of miles away. But in granting summary judgment, the district court deprived Haymes of an opportunity to prove a causal connection between the two events, finding in effect that the harm he suffered did not warrant affording a hearing irrespective of the motive for the transfer. We do not disagree with the assertion that not every inmate who must endure the burden alleged by Haymes deserves a full panoply of procedural armor. Removal of inmates to other facilities may be justified by any of a number of concerns quite proper to the administration of prison systems. One scarcely needs to be reminded of the sad events at Attica prison three years ago to understand the explosive potential flowing from the lamentable conditions which confront many prisoners. Although such circumstances neither excuse the need for reform nor justify sacrificing the inmate on the altar of security, they may on occasion render it necessary to take summary action to avert imminent riot. Overcrowding and the not unrelated hazards to health may also call for a prompt response by prison authorities. We certainly have no intention of unnecessarily placing prison officials in a straitjacket. But, generally, in such cases the reasons for transfer are extrinsic to the inmate's behavior, and the decision whether to transfer may not be advanced in any way by providing notice and a hearing to the transferee. Moreover, although the dislocation suffered by the transferred prisoner may be burdensome, the need to avoid more general harm may outweigh his individual claim.[4]

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[4] After all these years of reviewing prison problems, we are not too myopic to notice the distinct possibility of arbitrary, misguided, or disingenuous invocation of administrative justifications for transfer. Although we must to some extent rely upon the good faith of prison officials, the individual inmate is not left unprotected against such abuses. *See Newkirk* v. *Butler,* Slip op. 3893, 3899 (2d Cir. June 3, 1974).

Transfer intended as punishment, however, presents a situation wholly different from the administrative removal of an inmate to another facility. When harsh treatment is meted out to reprimand, deter, or reform an individual, elementary fairness demands that the one punished be given a satisfactory opportunity to establish that he is not deserving of such handling. While some discretion may be appropriate in an administrative determination of the need to avoid violence and unrest, the specific facts upon which a decision to punish are predicated can most suitably be ascertained at an impartial hearing to review the evidence of the alleged misbehavior,[5] and to assess the effect which transfer will have on the inmate's future incarceration. Indeed, in situations where punitive sanctions other than transfer are imposed, the New York correctional system has established procedures which recognize both the demands of elementary fairness and the suitability of an impartial hearing. It is to these regulations that we now turn.

II.

Four years ago the New York Commissioner of Corrections published, pursuant to authority given him by statute, *see* N.Y. Correction Law §§ 112, 137 (McKinney Supp. 1974), Procedures for Implementing Standards of Inmate Behavior. 7 N.Y.C.R.R. §§ 250 *et seq.* These rules, presently in force, are intended to be applied in instances where an inmate violates a rule or regulation governing his behavior, or fails to comply with an instruction given him

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[5] *See Wolff* v. *McDonnell,* 42 U.S.L.W. 5190, 5196 (June 26, 1974) (holding that "[s]ince prisoners in Nebraska can loose good-time credits only if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.")

by an employee of the department of corrections. Section 250.1. The code provides that minor infractions may be dealt with merely by counsel, warning, or reprimand. Section 251.5. Other standards apply to more persistent refractory behavior, and to misbehavior involving danger to life, health, security, or property. Reports of such conduct are required to be made in writing to the superintendent, §§ 251.4, 251.5(b), and are reviewed at least weekly by the prison adjustment committee. Section 252.3(a)-(c). The committee also looks at the information in the inmate's file; it may direct a further investigation, and must "obtain from the inmate as full and complete an explanation of his behavior in the situation as possible." Section 252.3(c)-(e). With the concurrence of at least two of the three members, the committee may then impose limited restrictions, the most serious of which is confinement in a special housing unit for a period of one week. Section 252.5. Where punitive sanctions are to be imposed, a "superintendent's proceeding" is provided before an impartial employee, at which formal written charges are filed, and notice and assistance given the inmate. The charge must be supported by substantial evidence, which is to include an interview with one or more of those who witnessed the incident. Sections 253.1 to 253.4. Punishment may then be imposed, includiing loss of privileges, change of program, confinement up to 60 days, special diet, loss of good behavior allowance ("good time"), and a requirement of restitution for intentional damage to state property. Section 253.5. Transfer is not specified among the sanctions to which a superintendent's proceeding may give rise.[6]

[6] The authority to transfer inmates is given by § 23 of the Correction Law, N.Y. Correction Law § 23 (McKinney Supp. 1974),

(footnote continued on following page)

We have recounted New York's prescribed procedure at some length in order to emphasize the disparity in treatment accorded inmates punished thereunder, and those who are summarily transferred for rule infractions. Had Haymes' action in circulating the petition been considered merely a minor infraction, it ordinarily would have received nothing more than a reprimand. Had it threatened danger to prison security, or had Deputy Superintendent Smith's allegation that Haymes had on other occasions rendered unauthorized legal assistance proved true, a report would have been filed for adjustment committee review. If Haymes had been thought to deserve one of the enumerated punitive sanctions, a full superintendent's proceeding would have been held. It is, of course, much to the credit of the New York correctional system that such thorough, specific, and sensitive procedures have been codified to govern the enforcement of standards for inmate behavior. But it would be anomalous indeed, "both from a due process and an equal protection point of view, if the prison authorities could accomplish by transfer a procedure-free punishment which they could not accomplish within their own walls." *Gomes* v. *Travisono,* 490 F.2d 1209, 1215 (1st Cir. 1973).

III.

Haymes' allegation that his transfer was intended as punishment for his violation of Rule 21 would not merit

(footnote continued from preceding page)

which provides:

> 1. The commissioner of correction shall have the power to transfer inmates from one correctional facility to another. . . . The transfer shall be in accordance with rules and regulations promulgated by the department for the safe delivery of such inmates to the designated facility.

No provisions are set out governing the proper occasions for transfer, or the procedure for determining whether such an occasion in fact exists.

relief, however, absent a showing that the move to the Clinton Correctional Facility in fact had consequences sufficiently adverse to be properly characterized as punitive. In granting summary judgment, the district court found that there was no allegation that the facilities at Clinton were "harsher or substantially different from those afforded to petitioner at Attica," citing *Wells* v. *McGinnis,* 344 F. Supp. 594, 596 (S.D.N.Y. 1972) (administrative transfer). Whatever may be the standards governing the need for hearing prior to administrative transfers, however, *see Newkirk* v. *Butler, supra,* note 4, we do not think it dispositive that both Attica and Clinton are maximum security facilities with similar programs. Rather, we find that the hardship involved in the mere fact of dislocation may be sufficient to render Haymes' summary transfer—if a trial establishes that it was punitive—a denial of due process.

The facts of this case may provide a good illustration of the real hardship in being shuttled from one institution to another. After being sent to Clinton, Haymes found himself several hundred miles away from his home and family in Buffalo, New York. Not only was he effectively separated by the transfer from his only contact with the world outside the prison, but he also was removed from the friends he had made among the inmates at Attica and forced to adjust to a new environment where he may well have been regarded as a troublemaker. Contacts with counsel would necessarily have been more difficult. A transferee suffers other consequences as well: the inmate is frequently put in administrative segregation upon arrival at the new facility, 7 N.Y.C.R.R. Part 260; personal belongings are often lost; he may be deprived of facilities and medications for psychiatric and medical treatment, *see Hoitt* v. *Vitek,* 361 F. Supp. 1238, 1249 (D.N.H. 1973); and educational and rehabilitative programs can be interrupted. Moreover, the

fact of transfer, and perhaps the reasons alleged therefor, will be put on the record reviewed by the parole board, and the prisoner may have difficulty rebutting, long after the fact, the adverse inference to be drawn therefrom. One can easily comprehend the bitterness which may be engendered by the capricious infliction of such unwarranted sanctions.[7] Small wonder, then, that the American Correctional Assocation has recognized that "[i]n any penal system embracing several institutions, transfer from one to another is often an effective disciplinary procedure as well as an administrative necessity." American Correctional Ass'n, Manual of Correctional Standards 416 (1972).

IV.

Because of the disposition we reach upon Hayme's claim that his transfer without hearing may have denied him due process if it was punitive in nature, we need not consider whether a genuine issue of material fact is raised by the allegation that the confiscated petition was special correspondence protected by Administrative Bulletin #20. We note, however, that the mere fact that the petition requested no relief does not automatically withdraw it from the category of "legal assistance" governed by Rule 21. If those who signed the letter did not expect the court to act on it of its own accord—a fact which is not at all clear—they at least thought, as Hayme's brief admits, that the

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[7] Although Hayme's complaint did not recite many of the deprivations we have enumerated, it is important to note that he was able to retain counsel only shortly before the district court rendered summary judgment. We think it proper that "the allegations of [a] *pro se* complaint [should be held] to less stringent standards than formal pleadings drafted by lawyers . . . ." *Haines* v. *Kerner,* 404 U.S. 519, 520 (1972) (per curiam). The charge that he was punished by the fact of transfer at least entitled Haymes to a hearing to explain why the transfer was onerous to him.

matter would be "referred . . . for investigation to other agencies, such as the FBI, interested public interest lawyers, or others . . ."

Nor do we think that the prohibition of unauthorized legal assistance should be rendered nugatory in any situation where the product of the forbidden collaboration happens to be a letter written to a public official. The concern underlying prison rules on legal assistance is that "strong-willed inmates might exact hidden and perhapus non-monetary fees" in return for legal advice, thereby presenting a menace to prison discipline. *See Sostre* v. *McGinnis*, 442 F.2d 178, 202 & n.47 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 1049 *and* 405 U.S. 978 (1972); *Johnson* v. *Avery*, 393 U.S. 483, 488 (1969). It would be shortsighted indeed to permit subversion of this obviously rational policy by so transparent a ruse as a mere change of salutation on legal documents.

Reversed.

APPENDIX B.

Opinion of the District Court, dated June 4, 1973.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 1972-410

UNITED STATES OF AMERICA ex rel. RODNEY R. HAYMES,

Petitioner

—vs—

ERNEST L. MONTANYE, Superintendent, Attica Correctional Facility, and Agent . . . . . SMITH, Deputy Superintendent Attica Correctional Facility,

Respondents

CURTIN, D.J.

This action began with a communication from petitioner to this court alleging that a document was seized from him by correctional authorities. Petitioner also alleged that two days after this document was seized, he was transferred from Attica Correctional Facility to Clinton Correctional Facility. Petitioner further alleged that two subsequent letters to Superintendent Montanye failed to effect the return of the confiscated document to petitioner.

In an order dated August 3, 1972, this court construed petitioner's communication as an application for relief under the Civil Rights Act (42 U.S.C. § 1983; 28 U.S.C. § 1343), and ordered the respondents to show cause why petitioner should not be allowed to proceed further.

Appendix B.

Included in respondents' answering papers to that order is the confiscated document that is the subject of this action. This document is in the form of a letter to this court, signed by 82 Attica inmates, charging that, because of the removal of petitioner as a law clerk in the prison library at the Attica Facility, they are denied adequate access to the courts. Also included in respondents' answering papers are affidavits from Edward V. Brady, Correctional Officer at the Attica Correctional Facility, and Harold Smith, Deputy Superintendent at the Attica Correctional Facility. These affidavits state that not long after petitioner's removal from his position as clerk in the law library at the Attica Correctional Facility, he was seen circulating a document in the recreation yard of the Attica Facility. Pursuant to the Attica rules which forbid inmates to provide legal assistance to other inmates without the approval of the Superintendent, the document was seized from him.

Petitioner submitted a reply to respondents' affidavits in which he moved to amend his original application to include Edward Brady as a respondent. That motion is granted and Mr. Brady is named as a respondent.

Subsequent to petitioner's reply, Herman Schwartz and Edward I. Koren of Buffalo, New York, who were retained as counsel by petitioner, have submitted a memorandum of law.

The court will consider each claim raised by petitioner and his counsel separately. Petitioner's original communication to this court alleges that the document seized by correctional authorities was a "legal petition" addressed to this court. He maintains that the seizure denies him adequate access to the courts. In response to this allegation, respondents state that the rules of the Attica Correctional Facility provide that inmates can give

Appendix B.

legal assistance to other inmates only if the request for such assistance is made through the law librarian of the Attica Facility.

This rule is not unreasonable as long as permission for inmates to assist each other is freely given. *See Johnson* v. *Avery,* 383 U.S. 483 (1969); *Sostre* v. *McGinnis,* 442 F.2d 178, 201 (2d Cir. 1971); *United States ex rel. Stevenson* v. *Mancusi,* 325 F. Supp. 1028 (W.D.N.Y. 1971); *In the Matter of the Application of William J. Kruth,* Civil No. 1972-230 (W.D.N.Y., Nov. 14, 1972).

The affidavit of Edward V. Brady, the law librarian at the Attica Facility, states that none of the 82 signatories of the seized letter ever asked for legal assistance. Petitioner's response to the affidavit does not controvert this fact. The court finds there has been no violation of petitioner's rights under *Johnson* v. *Avery, supra,* and subsequent cases.

Counsel for petitioner views the facts in this case somewhat differently, arguing that petitioner was not providing legal assistance to other inmates but was circulating a document seeking joint action to protest certain prison conditions, and that in retaliation for circulating this document, it was seized and petitioner was subsequently transferred. However, the court determines that, under the circumstances, the authorities had the right to seize the petition. *Christman* v. *Skinner,* 468 F.2d 723, 725 (2d Cir. 1972). The petitioner's right to communicate with the court or with counsel was not infringed.

The transfer of the petitioner from Attica to Green Haven did not violate petitioner's rights. Although a general allegation is made that punishment was the motive for the transfer, there is no allegation that the facilities at Green Haven are harsher or substantially different from

those afforded to petitioner at Attica. *See Wells* v. *McGinnis*, 344 F.Supp. 594, 596 (S.D.N.Y. 1972). Petitioner's transfer was consistent with the discretion given to prison officials in exercising proper custody of inmates.

Petitioner's application is dismissed.

Permission to appeal in forma pauperis is denied, with the qualification that the Clerk is directed to file a notice of appeal from this decision without the prepayment of the filing fee.

Further requests for permission to appeal in forma pauperis should be directed, on motion, to the United States Court of Appeals for the Second Circuit, Foley Square, New York City, in accordance with the requirements of Rule 24(a) of the Federal Rules of Appellate Procedure.

So ordered.

/s/
JOHN T. CURTIN
United States District Judge

Dated: June 4, 1973.

Supreme Court, U. S.
FILED
AUG 12 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-520

ERNEST L. MONTANYE, former Superintendent of Attica Correctional Facility, *et al.*,

Petitioners,

—against—

RODNEY R. HAYMES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 1, 1974
CERTIORARI GRANTED JUNE 30, 1975

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Docket Entries—District Court.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civ. 1972-410

UNITED STATES OF AMERICA ex rel. RODNEY R. HAYMES v. ERNEST L. MONTANYE, Superintendent, Attica Correctional Facility and Agent, —— SMITH, Deputy Superintendent, Attica Correctional Facility.

Date	Proceedings
8-3-72	Filed Petition
8-3-72	Filed Decision & Order allowing filing in forma pauperis & order that correctional officials show cause why petitioner should not be allowed to proceed in forma pauperis—Curtin, J ret. 9/8/72 (notice & copy to petitioner & Mr. Lefkowitz, Blfo.) F-131
8-3-72	JS 5 made /adj. 9/15/72—submitted
9-11-72	Filed Respondents Affidavits in Opposition
9-29-72	Filed Petitioner's Reply
6-4-73	Filed Decision & Order dismissing petr's. application; permission to appeal in forma pauperis denied but allowing filing notice of appeal without payment. Curtin DJ Notices & copies Messrs. Schwartz & Lefkowitz. F-14
6-4-73	JS 6 made
6-18-73	Filed Petitioner's Notice of Appeal (copy mailed 6/19/73 to Mr. Lefkowitz and to Clerk, CCA with copy of docket entries)

Complaint-Petition.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

Petition For Civil Rights Action, Title 42, U.S.C.A. Sections 1983 and 1985:

The Petition of Rodney R. Haymes, respectfully shows:

1) That on the dates herein mentioned and referred to he was confined in the Attica Correctional Facility within the district for which this court sits;

That on June 9, 1972 he was transferred to Clinton Correctional Facility.

Plaintiff is presently serving a term of eighteen years imprisonment pursuant to commitment from Erie County.

2) That petitioner is a citizen of the United States of America and resides in the State of New York.

3) That this court has original jurisdiction in this action as stated in United States Code, Title 28, Section 1343:

"The district Court shall have original jurisdiction of any Civil Rights Action authorized by law to be commenced by any person".

"A" to recover damages for injury to his person or property or because of any deprivation of any right or privilege of a citizen of the United States by act done in furtherance of any conspiracy mentioned in section 1985, Title 42, U.S.C.A.;

Complaint-Petition.

"B" to recover damages from any person who fails to prevent aid in any wrong mentioned in section 1985, Title 42 U.S.C.A. which he had knowledge were about to occur and the power to prevent;

"C" to redress the deprivation under color of any state law, regulation or usage of any right, privilege or immunity secured by the Constitution of the United States.

STATEMENT OF FACTS

Your petitioner is extremely aggrieved by the unlawful and capricious abuse resulting in the actions by the Attica Correctional Facility Supt. Montanye, as herein set forth.

- That on June 7, 1972 while petitioner was still confined at Attica Correctional Facility, an Attica Correction officer approached petitioner in "A" block yard at Attica, where petitioner was at that time with two fellow Attica Liaison Committeemen Representatives, wherein petitioner and his two fellow Committeemen were discussing a legal petition addresed to this court—Hon. John T. Curtin—at which time this Attica officer informed this petitioner he had been ordered by Deputy Supt. Smith to bring your petitioner's "petition" to Deputy Smith. Your petitioner then informed this officer that this "petition" was a legal petition, addressed to Federal Court Judge John T. Curtin, by and on behalf of your petitioner herein and the 100-150 other Attica inmates contained therein for the redress of grievances. Your petitioner further advised this officer that as a result of the Dept. of Corrections own directive, administrational bulletin #20, paragraph 10, any communications or correspondence to any court is privileged and confidential correspondence that will not be censored or read.

Following the above colloquy between your petitioner and the abovementioned officer, this officer in turn advised your petitioner that he was acting under orders of his "boss" and would have to take my petition.

Your petitioner then advised his two fellow committeemen that he would have to obey this officer's orders for petitioner to stay in the right himself, and in turn informed the officers that petitioner would like to personally take his "petition" to the Deputy Supt. The officer stated that he would allow petitioner to take his "petition" to Lt. Glor.

Your petitioner was then taken to Lt. Glor and was in turn informed by Lt. Glor that Supt. Montanye had ordered him to take your petitioner's "petition" to him. Your petitioner then again informed Lt. Glor that this "petition" was a "legal petition" addressed to Federal Court Judge John T. Curtin for the redress of grievances, by and on behalf of himself, and the 100-150 other Attica inmates contained therein. That this legal petition was privileged and confidential and came under administrational bulletin #20, paragraph 10.

Lt. Glor then informed your petitioner that he was under orders to take my "petition" to Supt. Montanye, and that he (Lt. Glor) thought that Supt. Montanye would return petitioner's "petition" to him after he read it.

Your petitioner then informed Lt. Glor that he was handing his "petition" over to him against his free will and under duress of orders.

That on June 8, 1972 petitioner wrote a note to respondent Montanye, attached herein marked Exhibit "A", wherein petitioner asked for the return of his "legal petition", or to be called in front of respondent Montanye.

Your petitioner further advised Supt. Montanye in this note that the "petition" that he had taken from your petitioner is a "legal petition" to Federal Court Judge

John T. Curtin for the redress of grievances by and on behalf of himself and all those inmates contained therein.

On the afternoon of June 8, 1972 petitioner was informed that he was being transferred to Clinton Correctional Facility.

That on June 19, 1972 your petitioner again wrote to respondent Montanye from Clinton, requesting the return of petitioner's petition that was confiscated from your petitioner on June 7, 1972, by order of the within respondents.

That petitioner has received no reply from the within respondent either to petitioner's note of June 8, 1972, or petitioner's letter of June 19, 1972, nor has your petitioner been returned his legal petition that was taken him from on June 7, 1972 by orders of the within respondents.

Your petitioner submits to this Court that the actions herein so far described in this action, as performed by, or on orders of the within respondents, are in violation of your petitioner's federally guaranteed constitutional rights pertaining to access to the courts and petitioner's federally guaranteed constitutional right to petition the courts for the redress of grievances as well as equal protection.

Petitioner further contends that the reason for his transfer from Attica to Clinton the day following the confiscating of the "legal petition," was obviously the result of the above respondent's conspiracy from keeping the petitioner from pursuing the return of this "petition", or from re-continuing with this action, as well as an intent to remove this petitioner from the jurisdiction of this court, both on the actions contained herein, as well as further assisting those plaintiff inmates contained in Civ. 1972-230 and Civ. 1972-249, presently on file in this district court

Petitioner further states that all of the above actions already set forth by the within respondent in confiscating this petitioner's "legal petition" by and on behalf of him-

Complaint-Petition.

self and other 100-150 Attica inmates contained therein; of removing your petitioner from his job assignment as law clerk at Attica Correctional Facility on June 7, 1972 (the morning prior to the confiscation of this legal petition that same afternoon) and of shipping your petitioner to Clinton Correctional Facility on June 9, 1972, was the direct result of administrational reprisals against your petitioner for assisting those inmates contained in Civ. 1972-230 and Civ. 1972-249; for assisting Attica inmate Louis Martinize #23379 in submitting his application to this Court in May, 1972; and from petitioner himself, along with those other inmates similarly aggrieved, attempting to petition this Court for the redress of grievances.

Conclusion

In conclusion it is submitted that the actions and conspiracy perpetrated by the within respondents are in violation of the United States and that these officials act under color of state law to violate federal laws and rights in violation of Title 18, sections 241 and 242 of the Federal Code Annotated.

That this conspiracy is also a violation of sections 1983 and 1985 of Title 42, U.S.C.A.

Wherefore, your petitioner prays that this honorable Court will afford him the granting of a hearing on this petition and also for leave to proceed in forma pauperis and for any further relief that this Court may deem just and proper.

(Sworn to by Rodney R. Haymes, July 6, 1972.)

District Court Decision and Order Allowing *in Forma Pauperis* Filing and Directing Respondents to Show Cause Why Petitioner Should Not Be Allowed to Proceed *in Forma Pauperis*.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

Petitioner pro se.

Petitioner, currently incarcerated at Clinton Correctional Facility, has submitted papers to this court which will be construed as an application for relief under the Civil Rights Act (42 U.S.C. § 1983; 28 U.S.C. § 1343).

Petitioner alleges that while discussing a legal petition to this court with fellow inmates in the prison yard of Attica Correctional Facility, he was approached by a corrections officer who advised that the petition had to be "brought over" to a certain deputy Smith. Upon protest by petitioner, he was allowed to personally bring the document to a Lieutenant Glor. Petitioner was informed that Lieutenant Glor was under orders to take the document to Superintendent Montanye. Petitioner protested but the document was confiscated.

On the following day, petitioner was informed that he was being transferred to Clinton Correctional Facility. Two subsequent letters to Superintendent Montanye from petitioner have failed to result in the return of the confiscated document.

The Clerk is directed to file petitioner's papers without the prepayment of filing fees.

District Court Decision and Order Allowing in Forma Pauperis Filing and Directing Respondents to Show Cause Why Petitioner Should Not Be Allowed to Proceed in Forma Pauperis.

Correctional officials are ordered to show cause on September 8, 1972 at 10:00 a.m. in Part II of this court at Buffalo, New York, why petitioner should not be allowed to proceed in forma pauperis. Petitioner need not be present at that time.

The answering papers shall be served on petitioner and he shall have twenty days to respond if he so desires.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: August 3, 1972

Affidavit of Douglas S. Cream in Opposition.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF ERIE
CITY OF BUFFALO } ss.:

DOUGLAS S. CREAM, being duly sworn, deposes and says:

He is an Assistant Attorney General of the State of New York, of counsel to Louis J. Lefkowitz, Attorney General of the State of New York and attorney for the respondents, and he is familiar with the petition herein.

Respectfully submitted are the affidavits of Edward V. Brady, Correction Officer and Notary Public at the Attica Correctional Facility, sworn to the 6th day of September, 1972, and Harold Smith, Deputy Superintendent at the Attica Correctional Facility, sworn to the 7th day of September, 1972, with Attachments "A", "B", and "C" annexed thereto, in opposition to the petition herein, and it is

FURTHER submitted that the said affidavits adequately and fairly answer the claims herein made by the petitioner.

A copy of this affidavit has been mailed to petitioner.

WHEREFORE, your deponent prays that the application herein be denied and that the proceeding be dismissed.

(Sworn to by Douglas S. Cream, September 11, 1972.)

Affidavit of Edward V. Brady in Opposition.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF WYOMING } ss.:

EDWARD V. BRADY, Correction Officer and Notary Public at the Attica Correctional Facility, being duly sworn, deposes and says that he is over twenty-one years of age and resides in Attica, New York.

My tour of duty in the above mentioned Facility consists of the supervision of the inmate law library and the notarization of any legal documents or writs which inmates may desire to submit to the courts, their attorneys, families or other interested parties.

The petitioner Rodney R. Haymes, was an inmate law clerk in the Attica Correctional Facility law library. He was relieved of his assignment as law clerk because of his continual disregard for the rules governing inmates and the use of the law library. He was instructed by me upon his being relieved of his assignment that the transfer in no way affected his being able to give legal assistance to other inmates provided proper procedure was observed. The day after his release, he had free use of the law library for whatever purpose he needed it.

As to the petition to the Hon. John T. Curtin, only one name of the eighty-three (83) signators has ever submitted a request for legal assistance to the best of my knowledge and belief. I emphatically deny that I have ever attempted to deny any inmate from receiving legal assistance. Further, I have never directly or indirectly attempted to circumvent the purpose of the law library or the inmate law clerks working therein.

(Sworn to by Edward V. Brady, September 6, 1972.)

Affidavit of Harold Smith in Opposition.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF WYOMING } ss.:

HAROLD SMITH, being duly sworn, deposes and says that he is over the age of twenty-one and resides on institution property. He is employed as Deputy Superintendent at the Attica Correctional Facility.

I have been Deputy Superintendent at Attica since March 30, 1972. The communication dated April 25, 1972 from Superintendent Montanye and displayed on the inmates cell block bulletin boards, has been in effect since my arrival and is still in effect. (Attachment "A")

Also attached and to be considered part of this affidavit is a copy of page eight (8) paragraph 21 of the Inmates Rule Book. (Attachment "B")

The attached petition (Attachment "C") was confiscated from inmate Rodney R. Haymes because of the rules and regulations in effect. This petition was being circulated in the recreation yard by inmate Haymes. Inmate Haymes had never requested permission from the Superintendent to circulate the petition nor had any inmates requested that he be permitted to assist them. His circulating the attached petition was in in direct disregard of the above rule forbidding legal assistance except with the approval of the Superintendent. Inmate Haymes having been an inmate law clerk in the law library was cautioned on several occasions about assisting other inmates without their having submitted a request for assistance and having received proper approval.

I have requested Correction Officer Edward V. Brady, law library supervisor to submit an affidavit as to whether or not any of the signators have ever submitted requests to obtain legal assistance.

(Sworn to by Harold Smith, September 7, 1972.)

Notice From Superintendent to Inmates, Exhibit "A" to Smith Affidavit.

Office of Superintendent

April 25, 1972

TO ALL CONCERNED:

In all instances where inmates desire assistance in the use of the Law Library, they are to present their problems to Correction Officer Brady, who will assist them to the extent necessary or will assign inmates on the Law Library staff to particular cases.

Under no circumstances are inmates to set themselves up as "legal counselors" and receive pay for their services.

ERNEST L. MONTANYE
Superintendent

Paragraph 21 of the Inmate Rule Book, Exhibit "B" to Smith Affidavit.

• • •

21. Inmates are prohibited, except upon approval of the Warden, to assist other inmates in the preparation of legal papers.

• • •

Confiscated Petition, Exhibit "C" to Smith Affidavit.

Hon. Judge John T. Curtin:

I am writing to complain that I am now being deprived of legal assistance as a result of inmate Rodney R. Haymes and John Washington being removed from the prison law library.

Since the removal of the above two from the law library, I cannot any longer obtain any legal assistance either in the nature of obtaining the proper applicable case law corresponding with the particular issue contained in my case, as well as assistance in preparing my post-conviction application to the courts.

The major problem and reason for my not being able to obtain legal assistance is a direct result of the attitude displayed by the law library officer whom goes out of his way to circumvent inmates legal assistance.

I feel that this was obviously the same reason why this officer has had Rodney Haymes and John Washington removed from the law library whereby they no longer have proper access to either the law books or myself and the other inmates whom they are legally assisting.

Wherefore, I feel that my constitutional rights to adequate access to the courts for judicial review and redress is being violated as a direct result of the circumstances and conditions herein set forth.

(Signed by 82 inmates.)

Motion to Amend.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

MOTION TO AMEND PURSUANT TO RULE 15

Rodney R. Haymes respectfully moves for permission of this honorable Court to amend his original application that was entered in the office of the Clerk of the United States District Court, W.D.N.Y., by order of the Court on the day of , 1972, bearing docket # 1972-410, to include the above named respondent, Edward Brady, and to further include the following raised issue and claim under "Answering Affidavit in Rebuttal" herein attached.

(Sworn to by Rodney R. Haymes, September 26, 1972.)

Affidavit of Rodney R. Haymes in Rebuttal.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

[SAME TITLE]

RODNEY B. HAYMES, being duly sworn, deposes and says:

That he denies each and every allegation set forth by the within respondents which claim, or tend to claim that the within respondents have not violated this plaintiff's Constitutional rights.

More specifically, plaintiff denies correction officer Edward Brady's statement that this petitioner was relieved of his assignment as law clerk as a result of plaintiff's disregarding any established rules or regulations governing inmates and the use of the law library.

Petitioner further denies as totally untrue Officer Brady's statement that he advised this plaintiff that his release from the law library as law clerk would in no way affect his being able to give legal assistance to other inmates.

The fact of the matter is that the day following this plaintiff's release from the law library, your plaintiff was called to the law library upon his request for the purpose of researching his own court cases. At that time your plaintiff sat in the law library from approximately 9:00 A.M. until 11:00 A.M. and was refused by Correction Officer Edward Brady the legal references that this plaintiff requested, by stating that he (Officer Brady) did not know how to locate the legal cases that your plaintiff requested. Furthermore, when your plaintiff finally requested permission to go to the book racks himself so that he could himself pull out the reference he wanted, respondent Edward Brady refused this also, hence, your petitioner sat in the prison law library from

9:00 A.M. until 11:00 A.M. without ever receiving any of the legal material that he had come to research.

Petitioner also further denies Officer Brady's statement that he has never attempted to circumvent the purposes of the law library or the inmate law clerks therein.

In addition to the actions already set forth above, your plaintiff states under the penalty of prosecution for perjury, that on many numerous occasions he had personally witnessed this Officer Brady willfully furnish various Attica inmates with improper and damaging legal advice as to the proper applicable law on a certain given legal point, as well as the proper cause of action thereto.

Furthermore, when your plaintiff would attempt to take the misguided inmate aside in order to properly set him on the proper course, this Officer Brady would tell your petitioner, or John Washington, that he didn't want us giving legal advice to inmates. If your plaintiff had access to his former law partner John Washington (who is incidentally presently confined in the "box" here at Clinton Corr. Facility) your plaintiff would undoubtedly be able to obtain an affirmation from Mr. Washington to this effect.

Your plaintiff further, contemptuously, denies Officer Brady's statement that he has never refused an inmate legal assistance. Inmates John Kruth and Theodore McCain are two inmates who were refused their requests for legal assistance from your plaintiff and John Washington by this Officer Brady in the presence of both your plaintiff and John Washington. See Civ. #1972-230 and Civ. #1972-249.

At the time that Officer Brady refused the above two inmates legal assistance, this plaintiff advised both John Kruth and Theodore McCain to write to this Court for possible redress.

Petitioner further charges Officer Brady with writing and submitting a false report wherein he previously ac-

cused this plaintiff of attempting to undermine the administrational function of the prison law library at Attica. As a direct result of this false accusation this plaintiff was expelled from his assignment as a law clerk.

Plaintiff states that the reasons involved in this Officer Brady submitting this false report against this plaintiff was a direct result of your plaintiff assisting inmates John Kruth, Theodore McCain et al. in submitting their grievances to this Court on the issue of inmates legal assistance.

Plaintiff respectfully moves that he be allowed to amend his original application under Rule 15 of the Federal Rules of Civil Procedure to include Officer Brady as a respondent in this action for the above described actions in depriving this plaintiff adequate and equal access to the prison law library and for submitting a false report against plaintiff out of an act of reprisal against your plaintiff for exercising his constitutional rights.

Your plaintiff respectfully moves for the above requested amendment rather than having to file a separate action. With respect to administrational Rule #21 referred to in the affidavit by the within respondent Harold Smith, plaintiff would like to state for the record the fact that he was never at any time during his commitment to Attica Correctional Facility from August 10, 1971 until June 9, 1972 furnished with an institutional rule book, and that furthermore, plaintiff knows as a matter of fact that no rule books have either been published or distributed to inmates at Attica Correctional Facility since approximately 1969. This fact has also been admitted to recently in a public statement by the within respondent Ernest L. Montanye wherein he was quoted by the Buffalo Evening News as stating that he was attempting to establish, along with the assistance of the Attica Liaison Committee, a temporary rule book pending revisal of a Departmental rule book governing inmates conduct.

Affidavit of Rodney R. Haymes in Rebuttal.

In regards to the communication dated April 25, 1972 as attached to the affidavit of Dep. Supt. Harold Smith, your petitioner has already expressed his position concerning the validity of this particular order as governing inmates legal assistance procedures as were revised and set forth in the cases of Civ. # 1972-230 and Civ. # 1972-249.

Plaintiff states that as a direct result of the manner and attitude displayed by the within respondents, particularly that of Edward Brady, and as a result of the inadequate and restrictive manner in which the within respondents conduct and allow and/or disallow legal assistance from one inmate to another, most inmates who do seek legal assistance are either denied such, or are purposely misled by the respondent Edward Brady. Furthermore, those inmates who are interested and willing to help other inmates with their legal work, such as your plaintiff, are either denied, put off, and at all times subjected to harassment.

Plaintiff further respectfully contends that the policy set forth by the within respondents governing inmates legal assistance, as well as attachment "A" included in the answering affidavits of respondents Harold Smith and Edward Brady, do not adequately comply with the standards proscribed in *Johnson* v. *Avery, Stevenson* v. *Mancusi;* nor those established in *Younger* v. *Gilmore.*

Furthermore, in *Stevenson* v. *Mancusi,* this very same Court ruled that departmental rule 21 (Attachment "B" in respondent's reply) were unreasonable, and further enjoined the State from enforcing this same rule.

Plaintiff states that the rule set forth in the respondent's answering affidavit regarding inmates legal assistance are so vague as to be both arbitrary and capricious, and furthermore, the manner in which this rule is presently being processed and distributed, is in fact, both arbitrary and capricious, as well as biased and discriminatory, both on the part of the inmate who seeks legal assistance, and that of the inmate who offers legal assistance.

Affidavit of Rodney R. Haymes in Rebuttal.

There are absolutely no guidelines or criteria set forth, or practiced, in the rules contained in the respondents' answering affidavit that establish under what conditions an inmate will be granted another inmate's legal assistance, and under what conditions he may be refused such assistance.

Plaintiff further states that it is apparent to him both from the vagueness of the department's rule as well as the manner which your plaintiff has personally been treated by the within respondents in attempting to furnish what legal assistance he could to other inmates, that, the respondents do not act in good faith in trying to establish a policy whereby an inmate who is trying to obtain, or furnish legal assistance, can accomplish the same.

Plaintiff further submits that, because of his efforts to furnish Attica inmates with legal assistance, rather than merely hand out a law book to an inmate, he was harassed, intimidated, removed from his assignment as law clerk in the prison law library, had his legal "petition" for the redress of grievances to this court taken from him, and subsequently kept from being submitted to this Court for a period of three months, and finally shipped from Attica to Clinton in an obvious conspiracy attempt to separate this plaintiff from the other inmates who were also petitioning the Court for redress concerning the inmates legal assistance, all of which were direct acts of reprisal by the within respondents against your plaintiff herein for attempting to exercise his own Constitutional rights and in attempting to assist other inmates in securing their Constitutional rights.

More important, is the fact that with respect to the "petition" herein at issue, (attached to the respondents' reply) plaintiff denies that he was rendering any legal assistance. Plaintiff states that he merely wrote a letter to this Court upon being requested to do so by the numerous Attica inmates, and, although there was an existing policy that an

inmate had to first request, and presumably receive permission before assisting another inmate in preparing a writ etc., it is likewise standard policy that any inmate can, at any time, without having to obtain permission in any manner, write a letter for any other inmate.

In any event, your plaintiff submits that in all reality he was not furnishing legal assistance at that time, but was merely writing a letter to this Court in behalf of himself and those inmates whom collectively requested that he do so, for the *real purpose* of gaining adequate access to legal assistance.

Your plaintiff also wishes to point out that this letter and petition was a legal document to this Court, and that the officer Lieutenant involved in confiscating this petition was, in fact, appraised of this fact prior to your plaintiff having this "petition" taken from him.

Attached herewith, marked attachment "A" is a copy of a letter from Mr. Charles Kitzen, Esq., who represents West Publishing Co., in a contract with the State Dept. of Corrections to train inmates in legal research and establishing of an inmates legal aid program. This letter by Mr. Kitzen will show a small bearing on his appraisal of the correction officer in charge of the prison law library—respondent Edward Brady.

Plaintiff intends to call Mr. Kitzen as a material witness if necessary.

Plaintiff concludes that under no circumstances can the within respondents justify the confiscating of his legal "petition", particularly in view of the length of time involved in unlawfully retaining custody of the within referred to "petition" and in keeping your plaintiff herein, along with the other inmate co-petitioners contained therein from submitting this "petition" to this very Court for the redress of grievances thereto.

Your plaintiff respectfully asks for compensatory and punitive damages awards in the following amounts.

Fifteen hundred dollars for compensatory damages, and fifteen hundred dollars for punitive damages.

The $1,500.00 compensatory award in retribution for the three month period in which the within respondents unlawfully retained custody of plaintiff legal "Petition" and thereby kept your petitioner herein from submitting this same "petition" to this very Court for redress of grievances.

The 1,500.00, punitive award is asked in compensation for the various acts of reprisals taken against this plaintiff by the within respondents, as set forth herein and in plaintiffs original applications, or, in the alternative, that an evidentiary hearing be granted on or as soon thereafter the 10th day of October, 1972 for the purpose of offering further evidence on the issues herein raised.

See: *Security & Exchange Comm.* v. *Frank,* 388 F.2d 486, 490, 492;
Greene v. *Bd. of Control of Florida,* 335 F.2d 752, 753;
Sims v. *Greene,* 161 F.2d 87;
City Line Center v. *Lowes,* 178 F.2d 267;
Haines v. *Kerner,* 40 U.S.L.W. 4156 U.S.

(Sworn to by Rodney R. Haymes, September 26, 1972.)

Letter to John Washington, Exhibit "A" to Haymes Affidavit.

WEST PUBLISHING COMPANY
INCORPORATED
170 OLD COUNTRY ROAD, MINEOLA, N. Y. 11501

TEL. 516/248-1900

May 17, 1972

Mr. John Washington # 24261
State of New York
Department of Correctional Services
Attica Correctional Facility
Attica, New York 14011

Dear Mr. Washington:

I am replying to your letter of April 21. Frankly, I am amazed to hear that you are still having difficulties with the correctional officer in charge of the law library.

I have conveyed to Mr. Victor Zuckerman, an attorney with the Department of Corrections, the difficulties you are having and that I experienced when I last visited Attica. Mr. Zuckerman has informed me that "this question is being carefully considered by the Department and a resolution is expected shortly."

During telephone conversations with Mr. Zuckerman he has strongly implied to me that the State Department would implement rules clearly assuring free access to the law library for all inmates, including a formalization of rules guaranteeing the rights of inmates to help other inmates in preparing other legal materials.

Letter to John Washington, Exhibit "A" to HAYMES *Affidavit.*

For my own part, I wish you to know that we have advised the Department of Corrections that there is no point in our training at Attica until such changes are made. I have every reason to believe that the Department, because of all of these factors, will shortly implement these rules.

I was impressed by both you and Mr. Haymes and I am sure, being the good lawyers that you are, that you are well aware of the Stevenson v. Mancusi case, which directly applied the Johnson Avery [sic] doctrine to Attica. If you have not read it or do not know about it, you had best remove yourself from my class!

Cordially yours,

CHARLES KITZEN

Opinion and Order of the District Court, June 4, 1973.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 1972-410

UNITED STATES OF AMERICA ex rel. RODNEY R. HAYMES,

Petitioner

—vs—

ERNEST L. MONTANYE, Superintendent, Attica Correctional Facility, and Agent . . . . . SMITH, Deputy Superintendent Attica Correctional Facility,

Respondents

This action began with a communication from petitioner to this court alleging that a document was seized from him by correctional authorities. Petitioner also alleged that two days after this document was seized, he was transferred from Attica Correctional Facility to Clinton Correctional Facility. Petitioner further alleged that two subsequent letters to Superintendent Montanye failed to effect the return of the confiscated document to petitioner.

In an order dated August 3, 1972, this court construed petitioner's communication as an application for relief under the Civil Rights Act (42 U.S.C. § 1983; 28 U.S.C. § 1343), and ordered the respondents to show cause why petitioner should not be allowed to proceed further.

Included in respondents' answering papers to that order is the confiscated document that is the subject of this action. This document is in the form of a letter to this

court, signed by 82 Attica inmates, charging that, because of the removal of petitioner as a law clerk in the prison library at the Attica Facility, they are denied adequate access to the courts. Also included in respondents' answering papers are affidavits from Edward V. Brady, Correctional Officer at the Attica Correctional Facility, and Harold Smith, Deputy Superintendent at the Attica Correctional Facility. These affidavits state that not long after petitioner's removal from his position as clerk in the law library at the Attica Correctional Facility, he was seen circulating a document in the recreation yard of the Attica Facility. Pursuant to the Attica rules which forbid inmates to provide legal assistance to other inmates without the approval of the Superintendent, the document was seized from him.

Petitioner submitted a reply to respondents' affidavits in which he moved to amend his original application to include Edward Brady as a respondent. That motion is granted and Mr. Brady is named as a respondent.

Subsequent to petitioner's reply, Herman Schwartz and Edward I. Koren of Buffalo, New York, who were retained as counsel by petitioner, have submitted a memorandum of law.

The court will consider each claim raised by petitioner and his counsel separately. Petitioner's original communication to this court alleges that the document seized by correctional authorities was a "legal petition" addressed to this court. He maintains that the seizure denies him adequate access to the courts. In response to this allegation, respondents state that the rules of the Attica Correctional Facility provide that inmates can give legal assistance to other inmates only if the request for such assistance is made through the law librarian of the Attica Facility.

Opinion and Order of the District Court, June 4, 1973.

This rule is not unreasonable as long as permission for inmates to assist each other is freely given. *See Johnson* v. *Avery,* 383 U.S. 483 (1969); *Sostre* v. *McGinnis,* 442 F.2d 178, 201 (2d Cir. 1971); *United States ex rel. Stevenson* v. *Mancusi,* 325 F. Supp. 1028 (W.D.N.Y. 1971); *In the Matter of the Application of William J. Kruth,* Civil No. 1972-230 (W.D.N.Y., Nov. 14, 1972).

The affidavit of Edward V. Brady, the law librarian at the Attica Facility, states that none of the 82 signatories of the seized letter ever asked for legal assistance. Petitioner's response to the affidavit does not controvert this fact. The court finds there has been no violation of petitioner's rights under *Johnson* v. *Avery, supra,* and subsequent cases.

Counsel for petitioner views the facts in this case somewhat differently, arguing that petitioner was not providing legal assistance to other inmates but was circulating a document seeking joint action to protest certain prison conditions, and that in retaliation for circulating this document, it was seized and petitioner was subsequently transferred. However, the court determines that, under the circumstances, the authorities had the right to seize the petition. *Christman* v. *Skinner,* 468 F.2d 723, 725 (2d Cir. 1972). The petitioner's right to communicate with the court or with counsel was not infringed.

The transfer of the petitioner from Attica to Green Haven did not violate petitioner's rights. Although a general allegation is made that punishment was the motive for the transfer, there is no allegation that the facilities at Green Haven are harsher or substantially different from those afforded to petitioner at Attica. *See Wells* v. *McGinnis,* 344 F.Supp. 594, 596 (S.D.N.Y. 1972). Petitioner's transfer was consistent with the discretion given to prison officials in exercising proper custody of inmates.

Petitioner's application is dismissed.

Opinion and Order of the District Court, June 4, 1973.

Permission to appeal in forma pauperis is denied, with the qualification that the Clerk is directed to file a notice of appeal from this decision without the prepayment of the filing fee.

Further requests for permission to appeal in forma pauperis should be directed, on motion, to the United States Court of Appeals for the Second Circuit, Foley Square, New York City, in accordance with the requirements of Rule 24(a) of the Federal Rules of Appellate Procedure.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: June 4, 1973.

Opinion of the Court of Appeals for the Second Circuit, October 4, 1974.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. RODNEY R. HAYMES,

Petitioner-Appellant,

against

ERNEST L. MONTANYE, Superintendent, Attica Correctional Facility, ... Smith, Deputy Superintendent, Attica Correctional Facility,

Respondents-Appellees.

Before: KAUFMAN, *Chief Judge,* SMITH and TIMBERS, *Circuit Judges.*

KAUFMAN, *Chief Judge:*

It is clear beyond cavil that American prisons have failed dismally to fulfill the ambition of contemporary penologists that prisoners should be treated and rehabilitated. Although it is impossible to deny that many are sentenced to prison as punishment, however, we cannot condone the idea that the mere fact of incarceration permits a prisoner to be punished at the whim of those charged with his confinement. Rodney Haymes, formerly an inmate at New York's Attica Correctional Facility, initiated this § 1983 action seeking damages for the confiscation of a "legal petition" which he circulated while in custody there, and for his alleged summary punishment two days later by transfer without a hearing to the Clinton Correctional Facility. We reverse the summary judgment dismissing his complaint.

Opinion of the Court of Appeals for the Second Circuit, October 4, 1974.

A brief recitation of the facts will aid in framing the issues we are called upon to decide. Haymes was discharged as inmate law clerk in Attica's law library on the morning of June 7, 1972. During the afternoon of that same day, prison authorities seized from Haymes a document which he was circulating among the inmates in the "A" block recreational yard. The writing, prepared by Haymes at the request of other prisoners and signed by 82 inmates, was addressed to Judge Curtin of the United States District Court for the Western District of New York. Although it requested no relief, the petition stated that the signatories were being deprived of legal assistance because of the removal of Haymes and John Washington, another inmate law clerk, from the library. The document charged that law library officer Edward Brady went "out of his way to circumvent inmates legal assistance." It also alleged this to be the reason for the removal of Haymes and Washington from their positions in the library.

Although no explanation for the confiscation was given at the time, Deputy Superintendent Harold Smith stated in an affidavit submitted in response to Haymes' complaint that the papers were seized because Haymes had not asked permission to circulate them, and none of the signers had requested legal assistance, despite the provision of Rule 21 of the Inmate's Rule Book:

> 21. Inmates are prohibited, except upon approval of the Warden, to assist other inmates in the preparation of legal papers.

While there is some question whether Rule 21 was in fact widely circulated,[1] Smith stated that Haymes had been cau-

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[1] Haymes stated in his affidavit submitted to the district court that he had never been given a rule book, nor had one been published since 1969.

tioned on several occasions not to assist other inmates who had not requested and received approval. A notice from former Superintendent Montanye, posted on the cell block bulletin boards April 25, 1972, also stated:

> In all instances where inmates desire assistance in the use of the law Library, they are to present their problems to Correction Officer Brady, who will assist them to the extent necessary or will assign inmates on the Law Library staff to particular cases.
>
> Under no circumstances are inmates to set themselves up as "legal counselors" and receive pay for their services.

Haymes protested the confiscation, asserting that the petition was protected as a special letter under Administrative Bulletin # 20, which provides:

> 9. Special correspondence to public officials: You may write to the President of the United States, Members of Congress, . . . and to any Judge. . . . The letter will not be read or censored.[2]

The real impact of the events leading to the seizure was felt when, two days later, on July 9, 1972, Haymes was transferred without a hearing from Attica to the Clinton Correctional Facility. Although both institutions are maximum security facilities, Clinton is several hundred miles farther away from Haymes' home in Buffalo. After his transfer, Haymes wrote twice to Superintendent Montanye

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[2] N.Y. Dep't of Correction, Administrative Bull. No. 20, Jan. 31, 1972. The Bulletin was published shortly after this court decided, in *Sostre* v. *McGinnis*, 442 F.2d 178, 200 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 *and* 405 U.S. 978 (1972), that censorship of inmate letters to courts, lawyers and public officials violated the first amendment rights of prisoners.

protesting the confiscation of the papers and requesting their return. He received no response.

Haymes then began this § 1983 action,[3] alleging that his transfer without hearing to Clinton, in retaliation for his disobedience of Rule 21, deprived him of due process. His complaint also alleged that the petition being circulated was not "legal assistance" but "special correspondence" protected by Administrative Bulletin # 20, and that its confiscation was therefore improper. He sought $1500 in compensatory damages for the time he was deprived of the document, and $1500 punitive damages "for the various acts of reprisals taken against" him. Haymes thereafter retained counsel. After considering affidavits and exhibits submitted to him, the judge, on Montanye's motion, "dismissed" Haymes's "application for relief under the Civil Rights Act." Since there is no indication that Judge Curtin found Haymes's claims to be frivolous, *see* 28 U.S.C. § 1915 (d), and because he considered matters outside the pleadings, *see* F.R.Civ.P. 12 (b), his disposition perforce was summary judgment. F.R.Civ.P. 56. Judge Curtin held that the seizure of the document, because it represented unauthorized legal assistance, was proper under Rule 21. He also found no violation of due process in Haymes's transfer. In effect, therefore, Judge Curtin decided that the alleged punitive nature of the transfer was not material. The district judge reasoned that, because no claim was made that "the facilities at Green Haven [sic] are harsher or substantially different from those afforded to petitioner at Attica," the defendants were entitled to judgment as a matter of law.

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[3] 42 U.S.C. § 1983 (1970). Although the case has been characterized throughout as a habeas corpus proceeding, the district court properly treated it from the outset as an action under the Civil Rights statute.

It is black letter law that the issue on an appeal from a summary judgment is whether the pleadings, affidavits, and other papers before the district court show a "genuine issue as to [some] material fact," requiring a trial, F.R.Civ.P. 56 (c). Haymes claims that the circumstances of his transfer raise two such issues: whether he was moved to Clinton Correctional Facility as punishment for his disobedience of prison rules and policies, and whether the effects of transfer were sufficiently harsh to make denial of a hearing a violation of due process. If the district court had permitted him to establish a punitive animus behind his transfer, the argument proceeds, he would not have been required to establish that Clinton's facilities were "substantially different" from those at Attica. Rather, Haymes argues, implicit in the very fact of his dislocation are deprivations at least as severe as those which may be imposed as punishment pursuant to the New York Correctional Rules and Regulations. Since some form of hearing is required before a misbehaving inmate can be made to suffer the specified sanctions, summary transfer for similar misbehavior may amount to a denial of due process. We see merit in this contention.

I.

We find it difficult, in the absence of a trial record, to look upon the circumstances of the transfer as a mere coincidence. The papers reveal that less than forty-eight hours after Haymes was ordered to cease collecting signatures without permission in the recreation yard, he was shipped to the Clinton Correctional Facility hundreds of miles away. But in granting summary judgment, the district court deprived Haymes of an opportunity to prove a causal connection between the two events, finding in effect that the harm he suffered did not warrant affording a

hearing irrespective of the motive for the transfer. We do not disagree with the assertion that not every inmate who must endure the burden alleged by Haymes deserves a full panoply of procedural armor. Removal of inmates to other facilities may be justified by any of a number of concerns quite proper to the administration of prison systems. One scarcely needs to be reminded of the sad events at Attica prison three years ago to understand the explosive potential flowing from the lamentable conditions which confront many prisoners. Although such circumstances neither excuse the need for reform nor justify sacrificing the inmate on the altar of security, they may on occasion render it necessary to take summary action to avert imminent riot. Overcrowding and the not unrelated hazards to health may also call for a prompt response by prison authorities. We certainly have no intention of unnecessarily placing prison officials in a straitjacket. But, generally, in such cases the reasons for transfer are extrinsic to the inmate's behavior, and the decision whether to transfer may not be advanced in any way by providing notice and a hearing to the transferee. Moreover, although the dislocation suffered by the transferred prisoner may be burdensome, the need to avoid more general harm may outweigh his individual claim.[4]

Transfer intended as punishment, however, presents a situation wholly different from the administrative removal of an inmate to another facility. When harsh treatment is meted out to reprimand, deter, or reform an individual,

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[4] After all these years of reviewing prison problems, we are not too myopic to notice the distinct possibility of arbitrary, misguided, or disingenuous invocation of administrative justifications for transfer. Although we must to some extent rely upon the good faith of prison officials, the individual inmate is not left unprotected against such abuses. *See Newkirk* v. *Butler,* Slip op. 3893, 3899 (2d Cir. June 3, 1974).

elementary fairness demands that the one punished be given a satisfactory opportunity to establish that he is not deserving of such handling. While some discretion may be appropriate in an administrative determination of the need to avoid violence and unrest, the specific facts upon which a decision to punish are predicated can most suitably be ascertained at an impartial hearing to review the evidence of the alleged misbehavior,[5] and to assess the effect which transfer will have on the inmate's future incarceration. Indeed, in situations where punitive sanctions other than transfer are imposed, the New York correctional system has established procedures which recognize both the demands of elementary fairness and the suitability of an impartial hearing. It is to those regulations that we now turn.

II.

Four years ago the New York Commissioner of Corrections published, pursuant to authority given him by statute, *see* N.Y. Correction Law §§ 112, 137 (McKinney Supp. 1974), Procedures for Implementing Standards of Inmate Behavior. 7 N.Y.C.R.R. §§ 250 *et seq.* These rules, presently in force, are intended to be applied in instances where an inmate violates a rule or regulation governing his behavior, or fails to comply with an instruction given him by an employee of the department of corrections. Section 250.1. The code provides that minor infractions may be dealt with merely by counsel, warning, or reprimand. Section 251.5. Other standards apply to more persistent refractory behavior, and to misbehavior involving danger

[5] *See Wolff* v. *McDonnell*, 42 U.S.L.W. 5190, 5196 (June 26, 1974) (holding that "[s]ince prisoners in Nebraska can loose good-time credits only if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.")

to life, health, security, or property. Reports of such conduct are required to be made in writing to the superintendent, §§ 251.4, 251.5(b), and are reviewed at least weekly by the prison adjustment committee. Section 252.3(a)-(c). The committee also looks at the information in the inmate's file; it may direct a further investigation, and must "obtain from the inmate as full and complete an explanation of his behavior in the situation as possible." Section 252.3(c)-(e). With the concurrence of at least two of the three members, the committee may then impose limited restrictions, the most serious of which is confinement in a special housing unit for a period of one week. Section 252.5. Where punitive sanctions are to be imposed, a "superintendent's proceeding" is provided before an impartial employee, at which formal written charges are filed, and notice and assistance given the inmate. The charge must be supported by substantial evidence, which is to include an interview with one or more of those who witnessed the incident. Sections 253.1 to 253.4. Punishment may then be imposed, including loss of privileges, change of program, confinement up to 60 days, special diet, loss of good behavior allowance ("good time"), and a requirement of restitution for intentional damage to state property. Section 253.5. Transfer is not specified among the sanctions to which a superintendent's proceeding may give rise.[6]

[6] The authority to transfer inmates is given by § 23 of the Correction Law, N.Y. Correction Law § 23 (McKinney Supp. 1974), which provides:

> 1. The commissioner of correction shall have the power to transfer inmates from one correctional facility to another. . . . The transfer shall be in accordance with rules and regulations promulgated by the department for the safe delivery of such inmates to the designated facility.

No provisions are set out governing the proper occasions for transfer, or the procedure for determining whether such an occasion in fact exists.

We have recounted New York's prescribed procedure at some length in order to emphasize the disparity in treatment accorded inmates punished thereunder, and those who are summarily transferred for rule infractions. Had Haymes' action in circulating the petition been considered merely a minor infraction, it ordinarily would have received nothing more than a reprimand. Had it threatened danger to prison security, or had Deputy Superintendent Smith's allegation that Haymes had on other occasions rendered unauthorized legal assistance proved true, a report would have been filed for adjustment committee review. If Haymes had been thought to deserve one of the enumerated punitive sanctions, a full superintendent's proceeding would have been held. It is, of course, much to the credit of the New York correctional system that such thorough, specific, and sensitive procedures have been codified to govern the enforcement of standards for inmate behavior. But it would be anomalous indeed, "both from a due process and an equal protection point of view, if the prison authorities could accomplish by transfer a procedure-free punishment which they could not accomplish within their own walls." *Gomes* v. *Travisono,* 490 F.2d 1209, 1215 (1st Cir. 1973).

III.

Haymes' allegation that his transfer was intended as punishment for his violation of Rule 21 would not merit relief, however, absent a showing that the move to the Clinton Correctional Facility in fact had consequences sufficiently adverse to be properly characterized as punitive. In granting summary judgment, the district court found that there was no allegation that the facilities at Clinton were "harsher or substantially different from those afforded to petitioner at Attica," citing *Wells* v. *McGinnis,*

344 F. Supp. 594, 596 (S.D.N.Y. 1972) (administrative transfer). Whatever may be the standards governing the need for hearing prior to administrative transfers, however, see *Newkirk* v. *Butler, supra,* note 4, we do not think it dispositive that both Attica and Clinton are maximum security facilities with similar programs. Rather, we find that the hardship involved in the mere fact of dislocation may be sufficient to render Haymes' summary transfer—if a trial establishes that it was punitive—a denial of due process.

The facts of this case may provide a good illustration of the real hardship in being shuttled from one institution to another. After being sent to Clinton, Haymes found himself several hundred miles away from his home and family in Buffalo, New York. Not only was he effectively separated by the transfer from his only contact with the world outside the prison, but he also was removed from the friends he had made among the inmates at Attica and forced to adjust to a new environment where he may well have been regarded as a troublemaker. Contacts with counsel would necessarily have been more difficult. A transferee suffers other consequences as well: the inmate is frequently put in administrative segregation upon arrival at the new facility, 7 N.Y.C.R.R. Part 260; personal belongings are often lost; he may be deprived of facilities and medications for psychiatric and medical treatment, *see Hoitt* v. *Vitek,* 361 F. Supp. 1238, 1249 (D.N.H. 1973); and educational and rehabilitative programs can be interrupted. Moreover, the fact of transfer, and perhaps the reasons alleged therefor, will be put on the record reviewed by the parole board, and the prisoner may have difficulty rebutting, long after the fact, the adverse inference to be drawn therefrom. One can easily comprehend the bitterness which may be engendered by the capricious infliction of such unwarranted

sanctions.[7] Small wonder, then, that the American Correctional Association has recognized that "[i]n any penal system embracing several institutions, transfer from one to another is often an effective disciplinary procedure as well as an administrative necessity." American Correctional Ass'n, Manual of Correctional Standards 416 (1972).

IV.

Because of the disposition we reach upon Haymes's claim that his transfer without hearing may have denied him due process if it was punitive in nature, we need not consider whether a genuine issue of material fact is raised by the allegation that the confiscated petition was special correspondence protected by Administrative Bulletin # 20. We note, however, that the mere fact that the petition requested no relief does not automatically withdraw it from the category of "legal assistance" governed by Rule 21. If those who signed the letter did not expect the court to act on it of its own accord—a fact which is not at all clear—they at least thought, as Haymes's brief admits, that the matter would be "referred . . . for investigation to other agencies, such as the FBI, interested public interest lawyers, or others . . ."

---

[7] Although Haymes's complaint did not recite many of the deprivations we have enumerated, it is important to note that he was able to retain counsel only shortly before the district court rendered summary judgment. We think it proper that "the allegations of [a] *pro se* complaint [should be held] to less stringent standards than formal pleadings drafted by lawyers . . . ." *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (per curiam). The charge that he was punished by the fact of transfer at least entitled Haymes to a hearing to explain why the transfer was onerous to him.

Nor do we think that the prohibition of unauthorized legal assistance should be rendered nugatory in any situation where the product of the forbidden collaboration happens to be a letter written to a public official. The concern underlying prison rules on legal assistance is that "strong-willed inmates might exact hidden and perhaps non-monetary fees" in return for legal advice, thereby presenting a menace to prison discipline. *See Sostre* v. *McGinnis*, 442 F.2d 178, 202 & n.47 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 1049 *and* 405 U.S. 978 (1972); *Johnson* v. *Avery*, 393 U.S. 483, 488 (1969). It would be shortsighted indeed to permit subversion of this obviously rational policy by so transparent a ruse as a mere change of salutation on legal documents.

Reversed.

Order of the Court of Appeals Staying the Mandate.

74-1208

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of November, one thousand nine hundred and seventy-four.

[SAME TITLE]

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated October 25, 1974 to stay issuance of the mandate to and including November 4, 1974 pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

GRANTED.

IRVING R. KAUFMAN, Chief Judge.
J. JOSEPH SMITH
WILLIAM H. TIMBERS
Circuit Judges

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 74-520

ERNEST L. MONTANYE, former Superintendent of Attica Correctional Facility, and HAROLD SMITH, former Deputy Superintendent of Attica Correctional Facility,

Petitioners,

v.

RODNEY R. HAYMES,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Rodney R. Haymes, who is now held in the Green Haven Correctional Facility, Stormville, New York, asks leave to file the attached Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

In lieu of respondent's affidavit, counsel's affidavit is attached hereto.

HERMAN SCHWARTZ
525 O'Brian Hall
SUNYAB North Campus
Amherst, New York 14260
(716) 636-2091

Counsel for Respondent

DATED: Amherst, New York
November 26, 1974

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RODNEY R. HAYMES,

Respondent.

AFFIDAVIT

HERMAN SCHWARTZ, being duly sworn, deposes and says:

1. I am counsel for Respondent Rodney R. Haymes in the above-entitled matter, and I submit this affidavit in lieu of his affidavit in support of his motion for leave to proceed in forma pauperis.

2. On November 21, 1974, I sent copies of a proposed affidavit of indigency to respondent Haymes at Green Haven Correctional Facility in Stormville, New York, where he is presently incarcerated. I asked that Mr. Haymes sign and notarize the affidavit, if theinformation contained therein was true and satisfactory to him.

3. On December 4, 1974, respondent's brief in the above-entitled matter is due in the Supreme Court.

4. As of today, November 26, 1974, your deponent has not received the affidavit from respondent Haymes, although it is expected soon. Since the office of counsel will be closed and counsel will be out of town from November 27th through December 1st, it is unlikely that your deponent will be able to receive and file respondent's affidavit of indigency prior to filing of respondent's brief.

WHEREFORE, your deponent requests that respondent be allowed to file only one copy (rather than 40 copies) of his brief on the assumption that respondent's affidavit of indigency will be filed within a week of the filing of the brief and that in forma pauperis treatment will be granted.

HERMAN SCHWARTZ

Sworn to before me this
26th day of November, 1974

AUDREY KOSCIELNIAK
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1976

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ERNEST L. MONTANYE, former Superintendent of Attica Correctional Facility, and HAROLD SMITH, former Deputy Superintendent of Attica Correctional Facility,

Petitioners,

v.

RODNEY R. HAYMES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 74-520

ERNEST L. MONTANYE, former Superintendent of Attica Correctional Facility, and HAROLD SMITH, former Deputy Superintendent of Attica Correctional Facility,

Petitioners,

v.

RODNEY R. HAYMES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Rodney R. Haymes, an inmate of the New York State prison system, hereby opposes the petition for a writ of certiorari filed by petitioners Ernest Montanye and Harold Smith to review a decision of the United States Court of Appeals for the Second Circuit in the case of United States of America ex rel. Rodney R. Haymes v. Montanye, which was decided on October 4, 1974. The decision reversed an order of the United States District Court for the Western District of New York, dated June 4, 1973, dismissing the complaint in a civil rights action brought pursuant to 42 U.S.C. §1983, 28 U.S.C. §1343. Although the case was captioned as a habeas corpus proceeding in the lower courts, it has been treated throughout as a civil rights action.

QUESTION PRESENTED

Should this Court review the question of whether a prisoner is entitled to due process if he is punitively transferred from one maximum-security prison to another, when the court below merely reversed dismissal of a pro se complaint and remanded the case for findings as to whether the transfer was indeed punitive and did produce sufficiently adverse consequences?

Statement of the Case

Respondent accepts petitioners' statement of the facts and prior proceedings herein as essentially correct, except for the assertion that "Haymes was not disciplined in connection with the incident" (P. 5).* Such a characterization begs the question ultimately raised by Haymes and which is the subject of the remand--was the transfer intended to discipline him?

ARGUMENT

The Court of Appeals decided very little: it merely ruled that where a prisoner asserts he has been punitively transferred--an assertion that respondent supported with specific factual allegations--a dismissal of his pro se complaint was not consistent with the liberal pleading rules of Haines v. Kerner, 404 U.S. 519, 520 (1972), without findings of (1) whether the transfer had in fact been imposed for punitive reasons, and (2) whether the prisoner suffered significantly adverse consequences. The court thereupon reinstated respondent's pro se complaint and remanded the case for trial to determine those two issues. There is thus no final judgment for this Court to consider, and review is inappropriate. Hamilton-Brown Shoe Co. v. Wolf Bro. & Co., 240 U.S. 251, 257-58 (1916); Bro. of Locomotive Firemen & Engineers v. Bangor & Aroostook R. R. Co., 389 U.S. 327 (1967); Cobbledick v. United States, 309 U.S. 323 (1940).

On such a record--which consists of nothing more than a few allegations in a pro se complaint and two affidavits in opposition filed by petitioners--it is difficult to see how the Court can use this case to adequately "resolve the transfer issue at the earliest possible date" (P. 11). In contrast with the comprehensive factual record made after days of testimony in Preiser v. Newkirk, No. 74-107, here we know so few of the essential facts that this Court would be deciding an abstract question in a factual vacuum, contrary to its long-standing policy and practice. See White Motor Co. v. United States, 372 U.S. 253 (1963).

---

*References to the petition will be cited as ("P. ___"); references to the appendix to the petition will be cited as ("A. ___").

I

THE COURT OF APPEALS MERELY GAVE RESPONDENT AN OPPORTUNITY TO SHOW HE WAS TRANSFERRED FOR PUNITIVE REASONS.

It is apparently undisputed between the parties that a transfer for the sole purpose of "disciplinary punishment in response to an act of misconduct" must be attended by "notice of the gravamen of the misconduct and an opportunity to be heard in relation thereto." The State of New York conceded as much--in exactly these words--in Newkirk v. Butler, 499 F.2d 1214, 1217 n. 4 (2d Cir. 1974), cert. granted sub nom. Preiser v. Newkirk, 43 U.S.L.W. 3223, No. 74-107 (October 21, 1974). Since it is clear that serious punishment may not be imposed without procedural due process, Wolff v. McDonnell, ___ U.S. ___, 42 U.S.L.W. 5190 (June 24, 1974), and usually is so attended in New York (A. 7a-9a), "it would be anomalous indeed," as Chief Judge Kaufman wrote,

> "both from a due process and an equal protection point of view, if the prison authorities could accomplish by transfer a procedure-free punishment which they could not accomplish within their own walls.' Gomes v. Travisono, 490 F.2d 1209, 1215 (1st Cir. 1973)." (A. 9a)

With respect to this issue, the Court of Appeals thus made no new law, but merely adopted a principle that petitioners apparently accept. All that that court did, was to remand for a finding as to whether the transfer was in fact punitive. The respondent had contended and supported his contention with factual allegations; petitioners themselves cited his rule violations in their affidavit responding to his complaint, and he was in fact transferred two days after the alleged violation.*

Indeed, petitioners' position on this first issue is not altogether clear. They nowhere disagree with the proposition that a transfer for disciplinary punishment requires due process, nor could they, consistent with their statement in Preiser v. Newkirk, quoted above. They try to evade the problem semantically, however, by labelling the transfer as being "without the imposition of disciplinary punishment" (P. 4, 5, 11).

This approach either begs the question of whether the transfer was intended as disciplinary punishment for a rule violation, or it defines

---

*Petitioners' own Statement of the Facts indicates the punitive nature of the transfer (P. 4-5).

the issue out of existence by simply denying that a transfer without a formal disciplinary charge and hearing is "the imposition of disciplinary punishment."

Petitioners also suggest that the Court of Appeals guidelines are "vague and unworkable" (P. 11). Without attempting to set out a definitive standard--which would obviously be inappropriate on such a sparse record--Chief Judge Kaufman noted that "when harsh treatment is meted out to reprimand, deter or reform an individual . . . one [is being] punished." (P. 7a) This hardly seems "vague and unworkable." Furthermore, the case was remanded to determine the reasons for the treatment, which would help to refine the standard.

Nor does the decision or opinion allow a prisoner to obtain a full federal court hearing whenever he chooses to label a transfer "punitive." Respondent alleged facts to support that conclusion, and petitioners themselves pointed to a particular rule violation as the basis for their actions. The Court of Appeals also noted that:

> "the papers reveal that less than forty-eight hours after Haymes was ordered to cease collecting signatures without permission in the recreation yard, he was shipped to the Clinton Correctional Facility hundreds of miles away." (A. 5a-6a)*

Most significantly, whether these criteria for what is "punitive" are "vague and unworkable," can only be determined after facts and evidence are developed with respect to the issue.

Disciplinary transfers for punitive purposes are a standard sanction within the prison disciplinary context. The Federal Bureau of Prisons provides for such transfers as the most severe of disciplinary sanctions, Policy Statement: Inmate Discipline, No. 7400.5C, ¶9(d)(6),

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*Petitioners' claim that the Court of Appeals' decision in this case conflicts with its earlier decision in Newkirk (P. 11-12) misconstrues both Newkirk and the decision below. Newkirk held only that a transfer could not escape due process requirements simply by being classified "administrative," if it produced a grievous loss. It did not hold or even intimate that punitive transfers could be inflicted without due process. Indeed, in language directly applicable to this case, the Court of Appeals wrote, "it would be something of a paradox if prison authorities could by transferring a prisoner for disciplinary reasons to another institution (within or without the state) deprive him of due process rights to which he would be entitled upon a transfer within the prison itself." 499 F.2d at 1218.

In any event, an intracircuit conflict can be and should be resolved by a rehearing en banc.

p. 13 (10-4-74),* as does the American Correctional Association Manual of Correctional Standards, p. 416 (1972).** When such a disciplinary transfer takes place, both parties agree that a prisoner is entitled to a fair hearing. All that the Court of Appeals did was to reverse a district court's denial of a prisoner's opportunity to show whether he was transferred for punitive purposes and with punitive effect.

II

THE RECORD IS BARREN AS TO WHAT RESPONDENT SUFFERED AS A RESULT OF THE TRANSFER AND THIS COURT IS IN NO POSITION TO DECIDE WHETHER A GRIEVOUS LOSS WAS INVOLVED IN THE TRANSFER.

This Court sits to decide important questions of law but only in the context of concrete fact situations, and not in a vacuum. Compare White Motor Co. v. United States, 372 U.S. at 263. (The Court must know "enough of the . . . stuff out of which" questioned practices emerge.) Here, there are virtually no facts upon which to decide whether and when a maximum-to-maximum intrastate transfer has consequences "sufficiently adverse to be characterized as punitive" (A. 10a).

---

*(d) Dispositions of the Institution Discipline Committee: The Institution Discipline Committee shall have available a broad range of sanctions and dispositions. These dispositions and sanctions will include the following:

. . . . . .

(6) Direct that an inmate be transferred to another institution for disciplinary reasons. Where a present or impending emergency requires immediate action, an inmate may be transferred prior to an Institution Discipline Committee hearing. However, a hearing before the Institution Discipline Committee at the receiving institution must be conducted as soon as practicable under the circumstances to consider the factual basis of the charge of misconduct and the reasons for the emergency transfer. Transfers for disciplinary reasons prior to a hearing before the Institution Discipline Committee are to be used only in emergency situations and only with the approval of the receiving Regional Director. However, when an inmate is transferred under these circumstances, the sending institution will forward copies of incident reports with completed investigation to the receiving institution for purposes of the hearing before the receiving institution's Institution Discipline Committee. All procedural requirements applicable to Institution Discipline Committee hearings contained in paragraph 9(c) of this policy statement will be utilized, except written statements of unavailable witnesses may be liberally accepted instead of live testimony."

**Quoted at A. 11a.

Petitioners' position on what constitutes the necessary grievous loss--which they say is "the legal issue at the heart of these cases" (P. 11)--is equivocal. At the close of their petition, they suggest somewhat tentatively that an inmate transferred like Haymes "may suffer fewer deprivations in a legal sense than" other transferees (P. 15) (emphasis added). This of course raises the possibility that inmates like Haymes "may" also suffer as much or more. Only a factually developed record like that in Newkirk, supra, or in Gomes v. Travisono, supra, can determine that question. Where, as here, there is no such record, it is difficult to know how this or any other Court can decide the question.

Earlier in the petition, however, petitioners seemed to argue that a prisoner who is transferred to an institution of the same security classification within the same state can never suffer serious loss (P. 14). Two paragraphs later, though, petitioners recognize that "an inmate may suffer some dislocation as a result of an intrastate transfer" at the same level but assert without any factual support that this cannot be enough "to invoke the Due Process Clause" (P. 14).

Each of these contentions is a clearly disputable and disputed factual question, which can only be determined after a trial of the facts. For example, where, as here, the transfer is for a serious violation of an important rule, an unanswered record notation of that event will label the prisoner a troublemaker in other institutions and often preclude him from good jobs, residence in an honor block, eligibility for certain training and other programs, opportunities for work release, furloughs, and the like.* Perhaps most important, such a record notation is likely to seriously reduce his chances for early release on parole.* The absence of a factual record on these questions precludes any assured judgment about these clearly grievous losses and thus precludes this Court from determining the possible consequences of a punitive transfer.

Second, the "program opportunities" may not be "essentially the same" (P. 14) at all maximum-security institutions within a state. In New York, they often have not been: Auburn Prison in New York had work-release long before Attica; Ossining had a computer training program which others did not. On this issue as well, the Court is in no position to decide whether Haymes suffered a substantial deprivation, without a factual record.

Finally, the dislocation could well involve many of the problems agreed by petitioners to result from an interstate transfer (P. 14), as Chief Judge Kaufman noted (A. 10a). These include, but are not limited to: segregation in special housing units for weeks after arrival in the receiving institution (see 7 NYCRR §304.4 on detention admissions for transferees with questionable behavior records); loss of records; loss of property; quite "serious problems of orientation" in a new invironment (P. 15); great distance from family, friends, and counsel; and much, much more. Again, without the

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*The loss of such benefits was alleged in Babchak v. Preiser, Civ. 74-265 (W.D.N.Y. 1974). In that case and months after the event, a New York State prison official described the reason for the transfer as follows:

> "It would appear to deponent that Mr. James F. Howser, Administrative Assistant, Program Services, was somewhat in error in regard to the plaintiff's transfer from Attica because of a suspected attempt to smuggle contraband into the facility, as this incident was just one of many alleged enterprises of a group of inmates in "E" Block, second floor, who had inordinate control and influence within the Attica Correctional Facility. This group consisted of the following inmates:
>
> JULIUS KLEIN T#25386, IIS #204299
> ENRICO GENTILE T#24004, IIS #422935
> SALVATORE NOTO T#27786, IIS #1025794
> RONALD F. BABCHAK T#23467, IIS #747352
> WAYNE TRIMMER T#23468, IIS #908534
> ROBERT POIRER T#27788, IIS #3278124
>
> "Such activities of this group centered around alleged involvement in performing degrading homosexual acts with a certain inmate who admitted some involvement to deponent; making homemade 'booze', (based on information and belief, four pails of homemade booze were found in one cell in 'E' Block, second floor, immediately following Inmate KLEIN's transfer) the alleged pilfering of 'pills' from the facility; the manipulation of certain Correction Officers by providing food, haircuts, favors to the extent that they could not effectively perform their duties; the manipulation of a Correction Counselor by one of the above named inmates to the extent that said inmate allegedly was selling furloughs in certain instances; deponent is in possession of two inmate statements to this effect; the alleged introduction by certain Correction Officers of contraband into and out of the facility." Affidavit in Opposition of Warren A. Harding, Assistant Inspector General, Department of Correctional Services of New York State (June 18, 1974).

This information obviously came from Babchak's file and is following him around. He first learned of it upon reading the affidavit in opposition, and denies the charges.

*Where early release on good time is affected by punitive action, due process is clearly required. McDonnell v. Wolff, supra. In New York, an in-prison committee called the Time Allowance Committee has the power to determine how much lost good time is restored to a prisoner after he serves two-thirds of his maximum, see 7 NYCRR §§260-61, N. Y. Corr. L. §803. Since a record notation of a punitive transfer and the reasons therefor can significantly affect the thinking of the Time Allowance Committee, the mere notation may be enough to reduce the ultimate good time allowance and inflict grievous loss. On remand, it can be ascertained whether Haymes has lost any good time and is therefore subject to the Time Allowance Committee's power to restore some or all of it.

kind of factual record developed in Newkirk, it is impossible to know whether or not "the consequences of . . . [Haymes' intrastate maximum-maximum transfer] are insufficient to be deemed a substantial deprivation in a legal sense or to invoke the Due Process Clause" (P. 14).*

III

THE GRANT OF CERTIORARI IN PREISER v. NEWKIRK DOES NOT JUSTIFY SIMILAR ACTION HERE.

Petitioners' primary argument for certiorari seems to be simply that since the Court is dealing with one transfer problem in Newkirk, it should deal with all transfer cases currently being offered to it (P. 15). And there may be a thought that since the Court has taken one transfer case, there is no harm in taking another one which seems to raise a somewhat different issue--intrastate transfers on the same custody level.

This reasoning is faulty. Newkirk v. Preiser, with its fully developed record and detailed legal analyses based on that record, was obviously an appropriate vehicle for deciding an important issue. This Court will note how often the Court of Appeals in Newkirk used portions of the record and findings to develop its legal analyses. See, e.g., 499 F.2d at 1217, 1218, 1219.

Here, by contrast, we have only a barebones, pro se complaint construed liberally under Haines v. Kerner, supra, and an affidavit in opposition from one of the petitioners. Nothing more. An issue as important

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*Petitioners' efforts to demonstrate great conflict in the cases seems unavailing. The four district court decisions cited on p. 9 of the petition hardly qualify as a conflict in circuits. The only Court of Appeals decision cited as possibly in conflict with the decision below with respect to intrastate transfers is Gray v. Creamer, 465 F.2d 179, 187 (3d Cir. 1972), but there is no indication that plaintiffs alleged there--as Haymes did here--that the transfers had resulted in substantial deprivations. The Third Circuit simply concluded that "based on the allegations of the complaint, we find no merit to this argument, since . . . a state prisoner has no constitutional right to remain in any prison."

With respect to interstate transfers, the only appellate decisions cited are Fajeriak v. McGinnis, 493 F.2d 468 (9th Cir. 1974), which explicitly noted that it was "unnecessary . . . to enunciate any broad procedural rule for general application in all cases involving nonconsensual transfer of a prisoner from one institution to another," 493 F.2d at 470 n. 3, and Hillen v. Director, 455 F.2d 570 (9th Cir. 1972), cert. denied, 409 U.S. 989 (1972), which was a one-sentence per curiam decision on a pro se appeal.

Moreover, whatever conflicts do exist can probably be decided by a decision in Newkirk.

as due process for punitive transfers from one maximum-security facility to another should not be decided on so thin a basis. Indeed, but for the fact that petitioners lost below, it is hard to believe that they would themselves consider this case an appropriate vehicle for determining these questions. We simply cannot know enough from the few papers filed herein to decide what fundamentally are complex factual issues.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that on November 27, 1974, I mailed a copy of the within Brief in Opposition to Louis J. Lefkowitz, Attorney General, State of New York, Two World Trade Center, New York, N. Y. 10047.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

74-520

ERNEST L. MONTANYE, former Superintendent of Attica Correctional Facility, et al.,

Petitioners,

against

RODNEY R. HAYMES,

Respondent.

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

74-520

ERNEST L. MONTANYE, former Superintendent of Attica Correctional Facility, et al.,

Petitioners,

against

RODNEY R. HAYMES,

Respondent.

BRIEF FOR PETITIONERS

Opinions and Orders Below

The opinion of the Court of Appeals for the Second Circuit is reported at 505 F. 2d 977 and is reproduced in the appendix at 28a-39a. The opinion and order of the United States District Court for the Western District of New York is unreported and is reproduced in the appendix at 24a-27a.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on October 4, 1974. The petition for certiorari was filed on November 1, 1974. Certiorari was granted on June 30, 1975.

Statute

New York Correctional Law § 23(1) (McKinney's Supp. 1974):

> "The commissioner of correction shall have the power to transfer inmates from one correctional facility to another. Whenever the transfer of inmates from one correctional facility to another shall be ordered by the commissioner of correction, the superintendent of the facility from which the inmates are transferred shall take immediate steps to make the transfer. The transfer shall be in accordance with rules and regulations promulgated by the department for the safe delivery of such inmates to the designated facility."

Question Presented

Whether the Due Process Clause requires that an inmate who is transferred within a state from one maximum security prison to another, with no imposition of disciplinary penalties, be afforded notice of the reasons for the transfer and an opportunity to be heard?

Statement of the Case

Respondent Rodney R. Haymes was convicted of manslaughter in the first degree and confined at Attica Correctional Facility on August 10, 1971. On June 9, 1972 Haymes was transferred from Attica Correctional Facility to Clinton Correctional Facility. Attica and Clinton are maximum security prisons operated by the New York State Department of Correctional Services. 7 New York Code of Rules and Regulations [hereinafter N.Y.C.R.R.] §§ 100.5, 100.15.

In July, 1972 Haymes commenced a *pro se* action in the United States District Court for the Western District of

New York pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343, complaining that Attica prison officials had taken a document which he was circulating among the inmates in a recreation yard at Attica on the afternoon of June 7, 1972 (3a, 5a, 11a).* In his complaint, Haymes characterized the document as a "legal petition for the redress of grievances" (2a-6a) which he had prepared at the request of other inmates (19a).** Haymes further alleged that his removal from his position as a clerk in the Attica law library and his transfer to Clinton were reprisals for his rendering legal assistance to other inmates (5a-6a, 19a).

Haymes did not seek a transfer back to Attica nor any declaratory or injunctive relief. He requested $1,500 compensatory damages for the time he was deprived of the petition and $1,500 punitive damages for the alleged acts of reprisal. At some later date Haymes obtained counsel who submitted a memorandum of law to the District Court in November, 1972.

Haymes' *pro se* motion to add the correction officer in charge of the law library as a defendant (14a) was granted (25a). Haymes' principal claim against the officer was that he was depriving *other* inmates of access to the courts (16a-19a). This claim and certain others which appear in the *pro se* papers (to wit, that he was denied use of the law library for two hours on June 8, 1972 and that he was deprived of an alleged constitutional right to render, not receive, legal assistance) were not pursued in the District Court memorandum or on appeal.

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* All numbers followed by the letter "a" refer to the Appendix filed with this Court.

** The petition was addressed to Judge Curtin of the United States District Court for the Western District of New York and was signed by 82 inmates, not including Haymes. The petition complained that the removal of Haymes and another inmate from their positions as clerks in the Attica law library on the morning of June 7 deprived the signatories of legal assistance and access to the courts. It also complained of the allegedly obstructionist attitude of the correction officer in charge of the law library (13a).

The responses of the Attica correctional officials [hereinafter defendants] stated that Haymes had been relieved of his job assignment because of his continual disregard for the rules governing inmates and the use of the law library (10a). It was further averred that Haymes' circulation of the petition was a direct violation of the prison rule prohibiting the rendering of legal assistance without prior permission (11a); that neither Haymes nor any other inmates had requested that he be allowed to assist them with the petition (11a);* and that Haymes had been cautioned on several occasions about rendering legal assistance without approval (11a).

Although the prison authorities retained Haymes' petition, he was not disciplined at Attica in connection with the incident. Nor did he incur any disciplinary penalties, such as disciplinary confinement** or loss of good-time credits, when he was transferred to Clinton.

On June 4, 1973 the District Court issued an opinion and order dismissing the complaint (24a-27a). The Court held

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* Paragraph 21 of the Inmates Rule Book states:

> "21. Inmates are prohibited except upon approval of the Warden, to assist other inmates in the preparation of legal papers" (12a).

More liberal rules pertained to the rendering of legal assistance within the law library (12a).

** The special housing unit designated "segregation" (7 N.Y.C.R.R. § 300.2[c]) is ordinarily used for inmates specially confined after a disciplinary proceeding (N.Y.C.R.R. § 250 *et seq.*; § 304.1[d]) and those awaiting disciplinary hearings (7 N.Y.C.R.R. § 304.1[c]). Although there are certain minimal standards applicable to all special housing units (7 N.Y.C.R.R. §§ 300 *et seq.*), inmates in disciplinary confinement are not allowed to commingle, even with those on the same status. Those in other special housing units are permitted programs and privileges beyond the minimal standards (7 N.Y.C.R.R. § 302.3). An inmate placed in segregation after a disciplinary proceeding often loses other privileges as well. E.g. 7 N.Y.C.R.R. § 253.5.

that Haymes' transfer from one maximum security facility to another, even if motivated as punishment, did not violate his rights since there was no allegation that conditions at the receiving institution were harsher or substantially different from those at the transferring facility (26a). The Court stated that Haymes' transfer "was consistent with the discretion given to prison officials in exercising proper custody of inmates" (26a). The Court further found that the Attica legal assistance rule was reasonable as long as permission for inmates to assist one another was freely given. Since no permission had been sought in the instant situation, Haymes' rights had not been violated (26a).

On October 4, 1974 the Court of Appeals reversed the District Court, holding that Haymes' claims regarding his transfer stated a claim under 42 U.S.C. § 1983. The Court did not determine whether or not Haymes had a protected interest in his retention at Attica but stated that elementary fairness demanded that a transfer "intended as punishment" be preceded by notice of the reason for the transfer and an impartial hearing at which the facts underlying transfer would be ascertained and its effect on the inmate's future incarceration assessed (33a-34a).

Although referring to this Court's decision in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) the court below did not follow the *Wolff* analysis to ascertain if a transfer between two maximum security prisons was a penalty to which due process attached. It simply assumed that this was true. In doing so, the Court of Appeals ignored the fact that a New York inmate has no legitimate expectation that he will be placed or retained in a particular facility or that he will be transferred only in response to misconduct charged and proved.

While initially holding that a prisoner's allegation of punitive motivation for the transfer was sufficient to invoke due process (33a-34a), the Court went on to hold that an inmate could not obtain relief unless he could also prove

that the transfer "in fact had consequences sufficiently adverse to be properly characterized as punitive" (36a). The mere allegation by an inmate that his transfer was punitive was found sufficient to entitle him to a judicial hearing "to explain why the transfer was onerous to him" (38a, n. 7).

The court then listed hypothetical adverse consequences which might arise from the "mere fact of dislocation" (37a). These included distance from family and counsel, the need to adjust to a new environment, separation from former inmate friends, administrative segregation, loss of property, interruption of program, deprivation of medical and psychiatric treatment, and recording of the fact and perhaps the reason for the transfer in the inmate's parole board record (37a).

Haymes had not alleged any of these adverse consequences in the District Court. The Court of Appeals excused his failure on the grounds that a *pro se* complaint should be liberally construed, noting that Haymes was able to retain counsel only shortly before the District Court's decision (38a, n. 7). Actually, Haymes had counsel at least seven months prior to the District Court decision; his attorneys' memorandum of law was received by the District Court on November 6, 1972.

In light of its disposition on the transfer issue, the Court of Appeals did not reach Haymes' claim concerning the taking of his petition. In *dictum*, however, the Court did note that the petition was not automatically withdrawn from the category of legal assistance and thus freed of the prior approval requirement because it failed to demand relief or because it happened to be in the form of a letter to a public official (38a-39a).

ARGUMENT

An inmate transferred from one maximum security prison to another maximum security prison does not have a protected interest encompassed by the Fourteenth Amendment and is not entitled to notice of the reasons for the transfer and an opportunity to be heard.

The procedural protection of the Due Process Clause extends only to those interests encompassed within the Fourteenth Amendment's protection of liberty or property. *Board of Regents* v. *Roth*, 408 U.S. 564, 570 (1972). *Accord, Arnett* v. *Kennedy*, 416 U.S. 134, 164-165 (1974) (POWELL, J., concurring); *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). The initial inquiry is not into the "weight" but the "nature" of the interest. *Goss* v. *Lopez*, —— U.S. ——, 42 L.Ed. 2d 725, 735 (1975); *Roth*, 408 U.S. at 570-571; *Morrissey* v. *Brewer*, 408 U.S. at 481. The transfer of an inmate from one maximum security prison to another, without the imposition of disciplinary confinement or the loss of good-time credits, does not affect any Fourteenth Amendment interest in liberty or property possessed by the inmate.*

Property interests are not created by the Constitution but are legitimate claims of entitlement secured and defined by existing rules or understandings which stem from an independent source. *Roth*, 408 U.S. at 577. E.g. *Perry* v. *Sinderman*, 408 U.S. 593 (1972) (*de facto* tenure program

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* *Newkirk* v. *Butler*, 490 F. 2d 1214 (2d Cir. 1974), *vacated as moot, sub nom. Preiser* v. *Newkirk*, —— U.S. ——, 45 L.Ed. 2d 272 (1975), presented the question of whether an inmate transferred to a stricter security prison had a liberty or property interest protected by the Fourteenth Amendment. Defendants maintain that no prisoner has a protected interest in cases of intrastate transfers, regardless of the security classifications of the prisons. The case at bar is confined to a transfer between two institutions within the same classification level.

at a state college); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (welfare benefits under a statutory scheme). See generally *Geneva Towers Tenants Org.* v. *Federated Mortgage Inc.*, 504 F. 2d 483, 493-496 (9th Cir. 1974) (HUFSTEDLER, J., dissenting); Comment, Entitlement, Enjoyment, and Due Process of Law, 1974 Duke L.J. 89.

There is no independent source for Haymes' expectation that he would remain at Attica Correctional Facility. In New York, a person convicted of a felony and sentenced to an indeterminate period of imprisonment* is committed to the custody of the New York State Department of Correctional Services. N.Y. Crim. Proc. Law § 430.20; N.Y. Penal Law § 70.30(1). The sentencing court cannot commit the person to a specific institution. See N.Y. Corr. Law § 71(6) (McKinney's Sup. 1974).** The Commissioner of the Department is directed to designate and classify facilities according to age, sex, security level, and function, N.Y. Corr. Law §§ 70(5), (6) and has done so. 7 N.Y.C.R.R. §§ 100 *et seq.* Adult, male felons are initially delivered to a reception center at a maximum security prison (N.Y. Corr. Law § 71[1]; 7 N.Y.C.R.R. § 103.10) where they are evaluated for initial transfer into one of the Department's institutions.

Once inmates are placed within the Department's custody, the Commissioner is specifically empowered by statute to "transfer inmates from one correctional facility to another". N.Y. Corr. Law § 23. See *People ex rel. Sacconanno* v. *Shaw*, 4 A.D. 2d 817, 164 N.Y.S. 2d 750 (3rd Dept. 1957); *People* v. *Collins*, 200 N.Y.S. 2d 919 (Co. Ct.

* See N.Y. Penal Law §§ 70.00, 70.00(4) (McKinney's Supp. 1974). Haymes was convicted of a class B felony and sentenced to an indeterminate sentence of up to eighteen years imprisonment.

** New York's current Correction Law appears in the 1974 supplement to volume 10B of McKinney's Consolidated Laws of New York, and all Correction Law references herein are to that supplement.

Schenectady Co. 1960); *People ex rel. Stephani* v. *North*, 19 Misc. 616, 155 N.Y.S. 595 (Sup. Ct. Clinton Spec. Term 1915). The Commissioner has delegated the power to transfer to the Division of Inmate Classification, established pursuant to N.Y. Corr. Law § 7, which must approve all transfers. No regulations have been promulgated in connection with the Commissioner's discretionary power to transfer. Transfers are not among the penalties which can be imposed after prison disciplinary hearings. See 7 N.Y.C.R.R. § 253.5.*

The New York statutory scheme refutes any claim of entitlement by an inmate to be placed or retained at any particular facility. No contrary practices or policies were suggested by Haymes or by the court below. Haymes could have no more than a "unilateral expectation" with respect to his place of confinement, and such expectations have been held by this Court to be insufficient to support a property interest encompassed by the Fourteenth Amendment. *Roth*, 408 U.S. at 577.

In contrast to the case at bar, the convicted parties asserting due process rights in *Morrissey* v. *Brewer*, 408 U.S. 471 and *Wolff* v. *McDonnell*, 418 U.S. 537 (1974), relied on state schemes which secured their claims of entitlement to a particular status. In *Morrissey*, parolees who faced the possibility of a significant loss of freedom if they were reincarcerated after revocation of their conditional liberty "relied on at least an implicit promise that parole will be revoked only if [they failed] to live up to the parole conditions." 408 U.S. at 482. See also *Gagnon* v. *Scarpelli*, 411 U.S. 656 (1973) (probation revocation). In *Wolff*, inmates subject to loss of good-time credits or disciplinary confinement, could expect, because of state statute and regulation, that such penalties would normally be imposed only after "flagrant or serious misconduct" which had to

* Compare United States Bureau of Prison Policy Statement No. 7400.5D, "Inmate Discipline", §§ 9(b), 9(d)(6) (July 7, 1975); California Department of Corrections Manual, Ch. VI, "General Transfer Procedures," § CL-VI-16 (included in the appendices of *amici*).

be reported to and evaluated by a disciplinary panel. 418 U.S. at 545 n. 5, 548-552 n. 8, 571-572 n. 19.

A Fourteenth Amendment interest in liberty does not extend to an inmate's desire to be placed or retained at a particular prison. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston,* 334 U.S. 226, 285 (1948). See also *Wolff,* 418 U.S. at 555-556; *Jackson* v. *Goodwin,* 400 F. 2d 529, 532 (5th Cir. 1968). One right necessarily withdrawn is the freedom to choose one's place of residence.

An inmate has no protected interest with respect to his initial placement, e.g. *Palmigiano* v. *Mullen,* 491 F. 2d 978, 980 (1st Cir. 1974); *Van Sirrs* v. *Ciccone,* 437 F. 2d 884 (8th Cir. 1971); *Duval* v. *Willingham,* 390 F. 2d 203 (10th Cir.), *cert. den.* 393 U.S. 877 (1968); *Lawrence* v. *Willingham,* 373 F. 2d 731 (10th Cir. 1967); *Rayborn* v. *Swope,* 215 F. 2d 604 (9th Cir. 1954); *Muniz* v. *United States,* 280 F. Supp. 542, 547 (S.D.N.Y. 1968), and he acquires no greater rights merely because he has served part of his sentence at a particular prison. See *United States* v. *Tierce,* 455 F. 2d 511 (9th Cir. 1972); *Fowles* v. *Anderson,* 386 F. Supp. 307, 309 (E.D. Okla. 1974); *Slotkin* v. *Brookdale Hospital Center,* 357 F. Supp. 701, 705 (D. Md. 1973); *King* v. *Norton,* 336 F. Supp. 255 (D. Conn. 1972); *Genovese* v. *Ciccone,* 331 F. Supp. 1117 (W.D. Mo. 1971).*

* Indeed if such a right accrued and a notice and hearing were required, the New York State Department of Correctional Services would have had to conduct 18,641 hearings in 1974, since 18,641 inmates were transferred among its institutions (see *post* at 16).

The suggestion by the court below that only those transfers "intended as punishment" invoke due process is of little assistance to the Department in determining when a hearing should be held. See, e.g., *Fano* v. *Meachum,* —— F. 2d —— (1st Cir. June 27, 1975) (CAMPBELL, J., dissenting), petition for certiorari filed, August 16, 1975; *Jones* v. *Manson,* 393 F. Supp. 1016, 1024 (D. Conn. 1975) (Commissioner of Correction would not be held liable

(footnote continued on following page)

A prisoner may not compel his transfer to a particular prison. E.g. *Moore* v. *United States Attorney General,* 473 F. 2d 1375 (5th Cir. 1973) (seeking a transfer to a prison closer to the inmate's wife and children); *Blassingame* v. *United States Attorney General,* 387 F. Supp. 418, 420, (S.D.N.Y. 1975) (seeking a transfer to the district where the inmate's action was pending); *People* v. *Hoffner,* 191 Misc. 345, 76 N.Y.S. 2d 915 (Co. Ct. Queens Co. 1947) (seeking a transfer to home county to consult with counsel). See also *Hawthorne* v. *People,* 68 Misc. 2d 964, 328 N.Y.S. 2d 488 (Sup. Ct. Albany Co. 1971) (refusal to transfer an inmate to a prison closer to his family does not constitute cruel and unusual punishment). Perforce, he may not avoid transfer and compel his retention at the prison to which he was last assigned.

The error in the court below flows from its failure to analyze whether Haymes had any protected interest at all in connection with his transfer. Rather, the Court focused on the punitive motivation and character of the transfer and the potentially adverse consequences ("grievous loss") to the inmate. Neither line of reasoning comports with this Court's prior decisions.

Wolff v. *McDonnell, supra,* extended certain procedural protections to inmates facing disciplinary confinement or the loss of good-time credits. The inmates whose good-time credits might be forfeited had no pure liberty interest in early release from custody but rather a statutorily based expectation that such credits would not be reduced except if they were found guilty of serious misconduct. 418 U.S. at 556-558. Similarly, the inmates who

(footnote continued from preceding page)

in damages when he believed in good faith that the transfer was for security not disciplinary reasons). Under the prior reasoning of the Court in *Newkirk* v. *Butler,* 499 F. 2d at 1217, the reason or label of the transfer was discounted in determining if process was owed to a transferred inmate. See also, *Gomes* v. *Travisono,* 510 F.2d 537, 541 (1st Cir. 1974), *modifying* 490 F. 2d 1209 (1973); *Kessler* v. *Cupp,* 372 F. Supp. 76 (D. Ore. 1973).

could be placed in disciplinary confinement not only faced a major change in conditions of confinement* but also had the same statutorily based expectation that such confinement would be imposed only after a major act of misconduct was charged and proved. *Id.* at 571-572 n. 19.

The court below did not apply the *Wolff* analysis to Haymes' transfer but simply assumed that a transfer between two maximum security prisons was a disciplinary penalty to which *Wolff* applied.** Applying the two-pronged reasoning of *Wolff* to the instant situation, it is apparent that Haymes suffered no punishment which warranted the protections of procedural due process. First, Haymes had no legitimate expectation that he would be remain at Attica or be transferred only for misconduct (*ante* at 8-9). Second, he suffered no major change in the conditions of confinement by virtue of the transfer. In fact, he was in the same position after the transfer as before. Haymes was not subjected to disciplinary confinement or the forfeiture of good-time credits. See *Bundy* v. *Cannon*, 328 F.Supp. 165 (D.Md. 1971). Because Attica and Clinton are both maximum security prisons, he was no more restricted in his conditions of confinement at Clinton than at Attica. There was no "marked" or "drastic" change from his previous custodial status. See *Palmigiano* v. *Baxter*, 487 F. 2d at 1284; *United States ex rel. Miller* v. *Twomey*, 479 F. 2d at 717. Unlike the segregated inmate, Haymes was not removed from the ordinary milieu of general population to an area of restricted confinement which is designed as a disciplinary tool.

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* Other courts also required a "marked" or "sufficiently drastic" change in status before mandating due process for inmates. E.g. *Palimigiano* v. *Baxter*, 487 F. 2d 1280, 1284 (1st Cir. 1973), *vacated and remanded*, 418 U.S. 907 (1974), *on remand*, 510 F. 2d 534 (1974), *cert. granted*, —— U.S. ——, 43 U.S.L.W. 3641 (June 9, 1975); *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701, 717 (7th Cir. 1973), *cert. den. sub nom. Gutierrez* v. *Dept. of Public Safety*, 414 U.S. 1146 (1974).

** Not every response to misconduct entitles an inmate to procedural due process. See *Wolff*, 418 U.S. at 571-572 n. 19 ("We do not suggest, however [that the same procedures] would also be required for the imposition of lesser penalties such as loss of privileges"). This Court has granted certiorari to review a contrary decision. *Cluchette* v. *Procunier*, 510 F. 2d 613 (9th Cir. 1975), *cert. granted sub nom. Enomoto* v. *Cluchette*, —— U.S. ——, 43 U.S.L.W. 3641 (June 9, 1975).

Additionally, the Court of Appeals erred in holding that the inmate was entitled to relief if he proved that his transfer was intended as punishment and that it had "consequences sufficiently adverse to be properly characterized as punitive" (36a). This focus on grievous loss, which goes to the weight and not the nature of the inmate's interest, ignores the dictates of this Court, e.g. *Goss* v. *Lopez*, 42 L.Ed. 2d at 735; *Roth*, 408 U.S. at 570-571; *Morrissey* v. *Brewer*, 408 U.S. at 481; *Fuentes* v. *Shevin*, 407 U.S. 67, 90 n. 21 (1972), and is characteristic of the lower court decisions in the prison transfer area.*

---

* Prior to the decision at bar, no court had ruled that procedural due process was owed to an inmate transferred within a state between two prisons of the same security classification. Those cases mandating due process procedures have concerned transfers to stricter security prisons and transfers of an interstate nature. In each area the courts have focused on the loss suffered by the inmate, with no analysis of liberty or property interest. E.g. *Gomes* v. *Travisono*, 490 F. 2d 1209 (1st Cir.) *vacated and remanded*, 418 U.S. 909, *on remand* 510 F. 2d 537 (1974); *Kessler* v. *Cupp*, 372 F. Supp. 76 (D. Ore. 1973); *Ault* v. *Holmes*, 369 F. Supp. 288 (W.D. Ky. 1973), *aff'd. in relevant part*, 506 F. 2d 288 (6th Cir. 1974) [interstate transfers]; *Newkirk* v. *Butler*, 490 F. 2d 1214 (2d Cir. 1974), *vacated as moot*, —— U.S. ——, 45 L.Ed. 2d 272 (1975); *Walker* v. *Hughes*, 386 F. Supp. 32 (E.D. Mich. 1974); *Stone* v. *Egeler*, 377 F. Supp. 115 (W.D. Mich. 1973), *aff'd. in relevant part*, 506 F. 2d 287 (6th Cir. 1974); *White* v. *Gilman*, 360 F. Supp. 64 (S.D. Iowa 1973) [transfers to stricter security prisons]. See also *Carroll* v. *Sielaff*, 514 F. 2d 415 (7th Cir. 1975); *Jones* v. *Manson*, 393 F. Supp. 1016 (D. Conn. 1975); Millemann & Millemann, The Prisoner's Right to Stay Where He Is, 3 Capital Univ. 223 (1974).

The same emphasis on grievous loss characterized those decisions professing to analyze for a property or liberty interest. E.g. *Fano*

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Moreover, the possible adverse consequences posited by the court below do not constitute a grievous loss which would invoke due process. Almost any change in the status of a prisoner may be perceived by him as a grievous loss. However, loss which is subjectively perceived as grievous, such as the possibility that discharge from employment may make one less attractive to some other employers, does not in itself invoke the right to notice and a hearing. *Roth*, 408 U.S. at 574 n. 13; *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896-898 (1961). The hypothetical consequences enumerated by the Court of Ap-

(footnote continued from preceding page)

v. *Meachum*, —— F. 2d —— (1st Cir. June 27, 1975), petition for certiorari filed, August 16, 1975; *Robbins* v. *Kleindienst*, 383 F. Supp. 239 (D.C.D.C. 1974); *Croom* v. *Manson*, 367 F. Supp. 586 (D. Conn. 1973); *Hoitt* v. *Vitek*, 361 F. Supp. 1238 (D. N.H. 1973). See *Gomes* v. *Travisono*, 510 F. 2d at 539. See also Note, Procedural Due Process in the Involuntary Transfer of Prisoners, 60 Va. L. Rev. 333 (1974); Note, Prison Discipline, 8 Ga. L. Rev. 919, 934-939 (1974).

Prior to the instant decision, two District Courts in the Second circuit had ruled that no claim cognizable under 42 U.S.C. § 1983 was stated by an inmate complaining of a transfer between two maximum security prisons within a state. *Schumate* v. *People of the State of New York*, 373 F. Supp. 1166 (S.D.N.Y. 1974); *Wells* v. *McGinnis*, 344 F. Supp. 594 (S.D.N.Y. 1972). See also *Beatham* v. *Manson*, 369 F. Supp. 783 (D. Conn. 1973) (transfer to less secure prison). Other courts considering the claims by transferred inmates found no constitutional interest implicated, regardless of the security classification of the two prisons or the interstate nature of the transfer. E.g. *Fajeriak* v. *McGinnis*, 493 F. 2d 468 (9th Cir. 1974); *Gray* v. *Creamer*, 465 F. 2d 179 (3rd Cir. 1972); *Hillen* v. *Director*, 455 F. 2d 516 (9th Cir. 1972), *cert. den.* 409 U.S. 989 (1972); *Benfield* v. *Bounds*, 363 F. Supp. 160 (E.D.N.C. 1973); *Urbano* v. *McCorckle*, 334 F. Supp. 161 (D. N.J. 1971), *aff'd.* 481 F. 2d 1400 (3rd Cir. 1973); *Bundy* v. *Cannon*, 328 F. Supp. 165 (D. Md. 1971).

Given that no state of the law in 1972 required due process before transferring an inmate between two maximum security prisons, defendants have unassailable defenses of good faith and official immunity to Haymes' demand for damages with regard to his transfer. See *Wood* v. *Strickland*, —— U.S. ——, 43 L. Ed. 2d 214 (1975). *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Fitler* v. *Rundle*, 497 F. 2d 794 (3rd Cir. 1974).

peals (37a) do not inflict a grievous loss on a prison inmate.•

An inmate does not suffer a constitutionally significant loss because he is geographically distant from his family or counsel, whether because of his initial placement or a transfer. That Haymes happened to be closer to home while at Attica Correctional Facility was solely incidental to his initial placement there. Nor does an inmate acquire a right to particular friends or a particular environment after his initial transfer into a prison. These aspects of prison life are not guaranteed by the Constitution or statute to a convicted person. To the contrary, the freedom to control these aspects of life is precisely what is stripped from an inmate by virtue of his conviction and incarceration. See, e.g., *Wolff*, 418 U.S. at 555-556; *Price* v. *Johnston*, 334 U.S. at 285.

The interruption of a particular educational or rehabilitative program does not impose a grievous loss on an inmate. An inmate has no right to any particular program (*Diehl* v. *Wainwright*, 419 F.2d 1309 [5th Cir. 1970], *Smith* v. *Schneckloth*, 414 F.2d 680, 682 [9th Cir. 1969]; *Russell* v. *Oliver*, 392 F. Supp. 470, 474 [W.D. Va. 1975]; *Thogmartin* v. *Moseley*, 313 F. Supp. 158, 160 [D. Kan. 1969], *aff'd.* 430 F.2d 910 [10th Cir.], *cert. den.* 400 U.S. 910 [1970]), let alone to an uninterrupted program. An interruption of an inmate's program can occur for myriad reasons, some related, some unrelated to his behavior. Haymes made no claim regarding an interruption of his program by virtue of his transfer, nor could he, since the

• Defendants emphasize that Haymes, who did not seek a transfer back to Attica, never alleged any of these consequences in the District Court (2a-6a, 14a-21a). It was not until his Court of Appeals brief that Haymes revealed that he suffered because of the geographic distance of Clinton from his home and family in Buffalo (Brief at 3, 11). Even while suggesting other possible results of a transfer, Haymes still did not claim that any were applicable to him personally (Brief at 11).

record establishes that he was removed from his program assignment as law clerk before the transfer occurred. Nor is grievous loss incurred because a transferred inmate may spend time apart from general population while he is being received at a new institution.* This separation is distinct from disciplinary confinement and is an ordinary incident of reception for any transferred inmate, irrespective of the reason for the transfer.**

Finally, the court below suggested that the fact of the transfer and perhaps the reason therefor, may become part of the record reviewed by the parole board and that an inmate may have difficulty rebutting the alleged adverse inference to be drawn. It is speculative in the extreme to imagine that the mere notation that an inmate has been transferred carries a negative inference. Transfers are so routine and frequent that no inference is drawn at all. In 1974 18,641 inmates were transferred among New York State facilities; in 1973 approximately 14,000 transfers were made. In the first seven months of this year over 12,100 transfers have already been made. The increase each year is due to the expanded number of correctional institutions and programs as well as an increase in the number of inmates.

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* Inmates transferred to a new institution may be placed in reception housing for a physical examination, an interview with the program committee, and orientation.

** Two other hypotheticals posited by the court below, the possibility of losing property and the deprivation of facilitites and medications for psychiatric and medical treatment, are totally unsupported by the record in this case. The Department of Correctional Services has advised the Attorney General that medical and psychiatric facilities and treatment do not vary among its maximum security prisons.

An inmate who loses property during a move, or at any other time, may pursue his claim administratively or pursuant to N.Y. State Finance Law § 8(12). It is a required procedure that transferring inmates be present at the packing and unpacking of their property, at which times they sign a standard inventory form used by all of the prisons.

It is likewise speculative to assume that a notation of reasons for the transfer will have an adverse effect on the inmate.* By law and regulation discretionary release on parole "shall not be granted merely as a reward for good conduct or efficient performances of duties assigned in prison." N.Y. Corr. Law § 213. The Board of Parole is directed to consider diverse factors such as the inmate's prior record, the nature of the crime, his attitude toward the crime and the victim, his response to efforts to improve his mental and moral condition, his institutional conduct, and the environment to which he plans to return. N.Y. Corr. Law § 214(4); 7 N.Y.C.R.R. § 1910.15. Parole release will be granted only if there is a reasonable probability that "if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society." N.Y. Corr. Law § 213. The inmate appears before the Board for a personal interview. N.Y. Corr. Law § 214(4), (5). Haymes did not suggest that the reason for his transfer was before the Board of Parole or that it affected his chance for parole release.

One of the most important instruments of penal management is the power to decide in which prison an inmate should be incarcerated. The range of reasons for transferring an inmate is quite broad. They include the initial classification decision to transfer an inmate from a reception center to a correctional facility; placement because of the opening or closing of a particular education or vocational program or an inmate's adjustment to a program; placement because of staff reductions or overcrowding; placement to separate those who present a danger to other inmates or a threat to institutional security; placement to protect an inmate from assaults or enemies; placement

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* In *Newkirk* v. *Butler*, 499 F. 2d at 1217, the same court stated that the absence of adverse parole consequences was not controlling.

closer to the inmate's release point. Added to the complexity of reasons for transfers is their sheer volume—the New York State Department of Correctional Services anticipates over 21,000 transfers among its twenty-seven correctional facilities in 1975.

This Court has recognized that the management of New York's prisons is of acute interest to the State and is intricately bound to its laws, regulations, and procedures. *Preiser* v. *Rodriguez*, 411 U.S. 475, 491-492 (1973). Federal courts "do not sit to supervise prisons" and the latitude must be accorded to prison officials in the administration of prison affairs. *Cruz* v. *Beto*, 405 U.S. 319, 321 (1972).

> "There is no doubt that discipline and administration of State detention facilities are State functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene." *Johnson* v. *Avery*, 393 U.S. 483, 486 (1969).

Transfers between two prisons of the same security classification, unaccompanied by disciplinary confinement or the loss of good-time credits, affect no protected interest possessed by inmates and present no constitutional issue to this Court.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Dated: New York, New York, September 3, 1975.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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OCT 20 1975
MICHAEL RODAK, JR., CLERK

No. 74-520

ERNEST L. MONTANYE, FORMER SUPERINTENDENT OF ATTICA CORRECTIONAL FACILITY, *et al.*,

Petitioners,

v.

RODNEY R. HAYMES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-520

ERNEST L. MONTANYE, FORMER SUPERINTENDENT OF ATTICA CORRECTIONAL FACILITY, *et al.*,

Petitioners,

v.

RODNEY R. HAYMES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

Whether a prisoner's *pro se* complaint, which alleged that, without any minimal due process, he was disciplinarily transferred from one prison to another as punishment for violating a prison rule, and that he suffered injury as a result of the transfer, was properly dismissed without a hearing by the District Court?

STATEMENT OF THE CASE

The respondent, Rodney R. Haymes, then a prisoner at Attica, was discharged from his job as inmate law clerk in the prison law library on the morning of June 7, 1972.[1] During the afternoon of that same day, prison authorities seized from Haymes a document which he was circulating among the prisoners in a recreation yard. The writing, prepared by Haymes at the request of other prisoners and signed by 82 of them, was addressed to Judge Curtin of the United States District Court for the Western District of New York. The petition stated that the signatories were being deprived of legal assistance and their right of access to the courts because of the removal of Haymes and another prisoner from the law library.

Haymes protested the seizure of the document and two days later, on June 9, 1972,[2] he was transferred without a hearing or notice from Attica to Clinton, several hundred miles away. He continued his protest and after receiving no response, he filed an action, *pro se*, in the United States District Court for the Western District of New York,[3] complaining that his constitutional rights were violated by the seizure of the document and by his punitive transfer without due process.

[1] This statement is taken from the opinion of the Court of Appeals (A. 28-39) and from the complaint filed in the district court (A. 2-6). The petitioners' Appendix is cited throughout as (A. -).

[2] This date appears erroneously as July 9, 1972 in the printed Appendix. (A. 30) The correct date is June 9, 1972 and is reflected in the reported decision. See *Haymes v. Montanye*, 505 F.2d at 978.

[3] The District Court and the Court of Appeals treated the complaint as an action under the Civil Rights Act, 42 U.S.C. § 1983. (A. 24, 31 n. 3)

Without holding a hearing, and after receiving affidavits solely related to the seized document issue, the District Court dismissed the complaint saying as to the transfer issue, "Although a general allegation is made that punishment was the motive for the transfer, there is no allegation that the facilities at Green Haven [sic] are harsher or substantially different from those afforded petitioner at Attica." (A. 26)

The Court of Appeals, deciding that the District Court must have granted summary judgment, rather than a motion to dismiss, because affidavits were considered,[4] reversed and remanded to the District Court for a hearing on what it considered were two controverted issues of material fact: whether Haymes was transferred as punishment for violating prison rules, and whether the effects of the transfer were sufficiently harsh to make denial of a hearing a violation of due process. (A. 31, 32).

SUMMARY OF ARGUMENT

I. The Court of Appeals, although erroneously characterizing the District Court's decision as summary judgement, was correct in implying that the allegations of a complaint must be taken as true for the purpose of

[4] As we point out in Section I, *infra*, we believe that although the Court of Appeals erroneously characterized the District Court's action as summary judgement, they reached the correct result.

a motion to dismiss for failure to state a claim. The District Court dismissed the complaint, without a hearing, and without either assuming the allegations of the complaint to be true, or reading the complaint in the light most favorable to the plaintiff. *Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947); *Scheuer v. Rhodes*, ____ U.S. ____, 94 S. Ct. 1683, 1686 (1974). Upon appeal from a motion to dismiss, the facts alleged in the complaint are also to be taken as true. *Cooper v. Pate*, 378 U.S. 546 (1964) (*per curiam*).

II. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45 (1957). Where the complaint was drafted and filed by a prisoner, *pro se*, it is held to less stringent standards than those drafted by lawyers, and the prisoner should be given every opportunity to offer proof in support of his allegations. *Haines v. Kerner*, 404 U.S. 519 (1971). Because the District Court heard no evidence on the motive for the respondent's transfer or on the injury suffered as a result of the transfer, this Court should remand the case to the District Court for an evidentiary hearing. *Haines v. Kerner*, 404 U.S. at 521.

III. Due process is a flexible concept and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Punitive involuntary transfers abridge interests of real substance and are sufficiently embraced within Fourteenth Amendment "liberty" to entitle a prisoner to procedural due process. *Wolff v. McDonnell*, 418 U.S. 539 (1974). This Court has rejected the

right/privilege distinction, *Morrissey v. Brewer, supra* at 481, and where a prisoner suffers grievous loss as a result of arbitrary government action, he is entitled to due process. *Wolff v. McDonnell, supra* at 558.

A large number of lower federal courts have followed this Court's decision in *Wolff v. McDonnell, supra*, in applying the principles of due process to prisoner transfers, E.g., *Gomes v. Travisono*, 510 F.2d 537 (1st Cir. 1974), looking both at the motive for the transfer and the injury caused by it. If the motive for the transfer were to punish a prisoner for engaging in constitutionally protected activity, he would certainly be entitled to relief, *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) and if state officials attempt to bypass procedural safeguards by labeling, as administrative, what is clearly punishment, a prisoner is also entitled to relief. *Gomes v. Travisono*, 490 F.2d 1209, 1215 (1st Cir. 1973).

A disciplinary transfer may result in injury such as loss of good-time and segregation, which this Court has already held to be serious sanctions entitling a prisoner to due process. *Wolff v. McDonnell*, 418 U.S. at 571, n. 19. In addition, a prisoner may suffer adverse parole consideration, separation from counsel, family and freinds and the interruption of rehabilitative programs, all of which are comparable to punishments meted out for serious disciplinary infractions and call for due process safeguards. *Gomes v. Travisono*, 510 F.2d 537 (1st Cir. 1974).

It is in the interest of corrections officials and society to treat a prisoner fairly. *Morrissey v. Brewer*, 408 U. S. at 484; *Palmigiano v. Baxter*, 487 F.2d 1280, 1283 (1st Cir. 1973), and unfair or arbitrary treatment

is detrimental to the prisoner as well as to institutional interests. Believing it to be in their interest, the Federal Bureau of Prisons considers a disciplinary transfer to be as serious a sanction as the loss of good time or segregation, and provides federal prisoners with all of the procedures required by *Wolff v. McDonnell, supra* in cases of disciplinary transfers.

ARGUMENT

THE COURT OF APPEALS WAS CORRECT IN REVERSING THE DISTRICT COURT'S DISMISSAL, WITHOUT A HEARING, OF A PRISONER'S *PRO SE* COMPLAINT WHICH ALLEGED THAT HE WAS DISCIPLINARILY TRANSFERRED FROM ONE PRISON TO ANOTHER, WITHOUT ANY MINIMAL DUE PROCESS, AS PUNISHMENT FOR VIOLATION OF A PRISON REGULATION AND THAT HE SUFFERED INJURY AS A RESULT OF SAID TRANSFER.

I.

The Allegations of a Complaint Must Be Taken as True for the Purpose of a Motion to Dismiss for Failure to State a Claim.

The respondent's *pro se* complaint was dismissed by the District Court, without a hearing, for failure to state a claim upon which relief could be granted.[5] In his complaint, the respondent raised two different

[5] The District Court devoted three sentences of its opinion to the transfer issue. (A. 26)

claims: First, that the seizure by prison officials of a "petition" he had circulated at Attica violated his "constitutional rights pertaining to access to the courts" and his "constitutional right to petition the courts for the redress of grievances as well as equal protection." His second claim was that he was transferred from Attica to Clinton as punishment, without due process, and that he was "extremely aggrieved" by the actions of the petitioners. (A. 2-6)

The petitioners submitted three affidavits in support of their motion to dismiss the first claim and did not address the second. Petitioners' own synopsis of the affidavits in their brief reads as follows:

> The responses of the Attica correctional officials (hereinafter defendants) stated that Haymes had been relieved of his job assignment because of his continual disregard for the rules governing inmates and the use of the law library (10a). It was further averred that Haymes' circulation of the petition was a direct violation of the prison rule prohibiting the rendering of legal assistance without prior permission (11a); that neither Haymes nor any other inmates had requested that he be allowed to assist them with the petition (11a); and that Haymes had been cautioned on several occasions about rendering legal assistance without approval (11a). (Br. for Pet. 4) (footnote omitted)

The District Court addressed each claim separately and, having considered affidavits from both parties on the seizure of the petition issue (A. 25), the Court obviously treated the petitioners' motion to dismiss as one for summary judgement pursuant to Rule 12, (b), (6), Federal Rules of Civil Procedure. (A. 31) At the same time, the District Court dismissed the unlawful transfer complaint for failure to state a claim.

The Court of Appeals, making no distinction between the treatment by the District Court of the two different claims, characterized the lower court's dismissal of the transfer claim as a summary judgment. Respondent submits that, although the Court of Appeals reached the proper result in reversing the District Court, the process by which the Court of Appeals reached that result was incorrect. Because the affidavits considered by the District Court only related to the seized petition issue, nothing was before that court on the transfer issue except the *pro se* complaint.[6] Because the facts relevant to the transfer issue (the only issue before this Court) were uncontroverted at the time of the District

[6]Though respondent agrees that consideration of materials extrinsic to the pleadings normally convert a 12(b) motion to a motion for summary judgement, such a conversion does not occur with uncontroverted pleadings. In *Duane v. Altenberg*, 297 F.2d 515 (7th Cir. 1962), affidavits were presented to the court, which found them "not competent for the purpose of negating the existence of a genuine issue of material fact where matters of motive or opinions or value are involved," 297 F.2d at 518. The court held the trial judge did not make the error of treating the defendant's motion as a summary judgment, but rather correctly disposed of the issue in an order to dismiss.

It is also proper for one allegation to be dismissed for failure to state a claim, while a second in the same complaint can be disposed of by summary judgement. In an action for violation of the securities and exchange acts in which the complaint alleged violations of three different sections, the court disregarded affidavits submitted as to two counts and dismissed for failure to state a claim, but finding that the affidavits as to the third count provided uncontradicted evidence dispositive of the claim, it treated the motion as to that claim as a motion for summary judgement. *Kaminsky v. Abrams*, 281 F. Supp. 501 (S.D. N.Y. 1968).

Court's opinion, this Court should properly recongize that the District Court granted a motion to dismiss.[7]

It is well settled that for the purpose of a motion to dismiss for failure to state a claim upon which relief may be granted, the allegations of the complaint must be taken as true.

> In passing on a motion to dismiss because the complaint fails to state a cause of action, the facts set forth in the complaint are assumed to be true and affidavits and other evidence produced on application for a preliminary injunction may not be considered. *Land v. Dollar*, 330 U.S. 731, 735 N.4 (1947)

See also Hoy v. Progress Pattern Company, 217 F.2d 701 (6th Cir. 1954); 2A *J. Moore, Federal Practice*, §12.08, pp. 2266-2267 (2d Ed. & Supp. 1974) (hereinafter *Moore's*).

[7]Alternatively, if this Court finds that the District Court granted a motion for summary judgement on the transfer issue, as did the Court of Appeals, respondent submits that the Court of Appeals decision should be upheld in finding that summary judgement was erroneously granted to the petitioners. Summary judgement pursuant to Rule 56 of the Federal Rules of Civil Procedure does not contemplate trial by affidavit. *Sartor v. Arkansas Natural Gas Co.*, 321 U.S. 620 (1944). When pleadings and affidavits present genuine issues of material facts, summary judgement is inappropriate. *Elgin, J & E Ry. Co. v. Burley*, 325 U.S. 711 (1945). As the Court of Appeals correctly points out, two genuine issues of material fact were and are still in dispute. (A. 32) Those issues, the motive for the transfer and the resulting injury are discussed in Section III, *infra*.

In addition, the doctrine of *Haines v. Kerner*, 404 U.S. 519 (1972), discussed in Section II, *infra*, should be read to apply at the summary judgement stage, particularly when the respondent filed an affidavit controverting those filed by the petitioners. See footnote 7 of the Court of Appeals decision. (A. 38)

It is also clear that the complaint is to be read in the light most favorable to the plaintiff. If any reasonable inference can be drawn from the facts which would entitle a plaintiff to relief, a defendant's motion to dismiss must fail. *Scheuer v. Rhodes*, ____ U.S. ____, 94 S. Ct. 1683, 1686 (1974). *See generally Moore's*, §12.08, pp. 2271-2274.[8]

This Court has consistently stated that upon appeal from a motion to dismiss, the facts alleged in the complaint are also to be taken as true. In *Cooper v. Pate*, 378 U.S. 546 (1964) (*per curiam*), this Court accepted as true the allegations of a prisoner's complaint, and held that the District Court and the Seventh Circuit Court of Appeals were in error to dismiss it. Similarly, in *Cruz v. Beto*, 405 U.S. 319 (1972), this Court, citing *Cooper v. Pate, supra*, reversed the dismissal of a prisoner's complaint of religious discrimination because the allegations of the complaint were to be taken as true. See also, *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965); *Gardener v. Toilet Goods Association*, 387 U.S. 167 (1967); *Escalera v. New York Housing Authority*, 425 F.2d 853, 857 (2d Cir. 1970), *cert. denied* 400 U.S. 853 (1970).

Thus we start with the proposition that the ordinary litigant is entitled to his day in court and turn to the plight of the prisoner-litigant.[9]

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[8] As discussed in Section II, *infra*, the standard of "reasonable inference" is far less stringent when the complaint was drafted *pro se* by a prisoner.

[9] We repeat, for emphasis, that the District Court never held a hearing in this case before it dismissed the respondent's complaint.

II.

A Prisoner's *Pro Se* Complaint Is Held to Less Stringent Standards Than Formal Pleadings Drafted by Lawyers and May Not Be Dismissed Unless It Appears Beyond Doubt That The Plaintiff Can Prove No Set of Facts in Support of His Claim Which Would Entitle Him to Relief.

More than twenty years ago Mr. Justice Frankfurter admonished:

> Care will naturally be taken that the frequent lack of technical competence of prisoners should not strangle consideration of a valid constitutional claim that is bunglingly presented.
>
> *Brown v. Allen*,
> 344 U.S. 443, 502 (1953)

This Court recognized the mandate of Rule 8(f) of the Federal Rules of Civil Procedure that "All pleadings shall be so construed as to do substantial justice" in *Conley v. Gibson*, 355 U.S. 41, 45 (1957) when it stated:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Haines v. Kerner, 404 U.S. 519 (1971) settled the law on interpreting a prisoner's *pro se* complaint by holding that such a complaint must be given the most liberal and favorable construction by the courts. In *Haines*, the prisoner-plaintiff's *pro se* complaint alleged general physical injuries and denial of due process while in disciplinary confinement. The Seventh Circuit

affirmed dismissal of his complaint, emphasizing prison officials' "wide discretion" in disciplinary matters. This Court addressed only the question of whether the District Court erred in dismissing the inmate's *pro se* complaint without hearing evidence on his claims. Careful not to intimate any view on the merits of the inmate's complaint, nor on the scope of inquiry by courts into prison administration, the Court reversed. The test applied was whether the Court could say with assurance, holding the *pro se* complaint to less stringent standards than those drafted by lawyers, that it appeared beyond doubt that the plaintiff could not prove a set of facts which would entitle him to relief. Applying that standard, the Court reversed the dismissal of the prisoner's complaint holding that "he is entitled to an opportunity to offer proof". 404 U.S. at 521.

Subsequent circuit court of appeals decisions have unhesitatingly followed the principles established in *Haines v. Kerner, supra.* In *Fajeriak v. McGinnis*, 493 F.2d 468 (9th Cir. 1974) the Ninth Circuit reversed the dismissal of a *pro se* prisoner's complaint which alleged that they were punitively transferred without due process because of their religious beliefs. The Second Circuit reversed the dismissal of a *pro se* prisoner's complaint that he was hindered in his ability to prepare legal papers in *Corby v. Conboy*, 457 F.2d 251 (2d Cir. 1972). See also *Blair v. Rockefeller*, 469 F.2d 641 (2d Cir. 1972); *Russell v. Bodner*, 489 F.2d 280 (3rd Cir. 1973); *Jones v. Lockhart*, 484 F.2d 1192 (8th Cir. 1973); *Gregory v. Wyse*, 512 F.2d 378 (10th Cir. 1975); *Bryant v. Harris*, 465 F.2d 365 (7th Cir. 1972).

It is important to note that in *Haines v. Kerner, supra* this Court did not delve into the substantive law

of due process and prison discipline saying that "although we intimate no view whatever on the merits of petitioner's [the prisoner] allegations, we conclude that he is entitled to an opportunity to offer proof." 404 U.S. at 521. The case at bar is in precisely the same posture and the respondent submits that where Constitutional questions of such importance are at issue,[10] it would be inappropriate for this Court to rule on those questions absent a record.[11]

The Second Circuit Court of Appeals found that two genuine issues of material fact were never addressed or resolved by the District Court. These are "whether he (the respondent) was moved to Clinton Correctional Facility as punishment for his disobedience of prison rules and policies, and whether the effects of transfer were sufficiently harsh to make denial of a hearing a violation of due process."[12] (A. 32) Without affording

[10]As we point out in Section III, *infra*, these important questions have been, and are presently being, considered by many lower federal courts. Indeed, at least one case involving similar issues is presently before this Court. *Meachum v. Fano*, No. 75-252, O.T. 1975, cert. pet. pending.

[11]Compare the petitioners' assertions, *hors* the record, that the respondent suffered no injury from the transfer because there was nothing in his file from which the parole board could draw a negative inference (Br. for Pet. 16, 17) with the *appendices* to respondent's brief.

[12]Although the petitioners suggest for the first time a possible immunity defense in a footnote at page 14 of their brief, we agree with the Solicitor General that this defense, if any, has been abandoned. (Br. for United States as Amicus Curiae, 7., n. 7) In any event, whether the petitioners acted in good faith, necessary to support an immunity defense, is a question of fact which requires an evidentiary hearing. *Scheuer v. Rhodes*, ____ U.S. ____, 94 S. Ct. 1683, 1693 (1974).

the respondent an opportunity to present evidence on those factual questions, any decision this Court would make as to the rights of a victim of punitive transfer would be based on speculation.[13]

This Court should either decide that certiorari was improvidently granted and dismiss the petition, or affirm the decision below, remanding the case to the District Court for an evidentiary hearing.

III.

The Due Process Clause of the Fourteenth Amendment Requires That a Prisoner Who Is Disciplinarily Transferred as Punishment For Violation of a Prison Regulation And Who Suffers Grievous Loss as a Result of Said Transfer Be Given Notice and Opportunity For a Hearing.

A. A Prisoner's Interest in Due Process

This Court has repeatedly held that a due process hearing is necessary before the government may act in a way injurious to private interests whenever "the nature of the interest [jeopardized by governmental action] is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). Involuntary transfers directly and indirectly compromise the most

[13]This Court refused to engage in such speculation in a transfer case decided just last term. *Preiser v. Newkirk*, ____ U.S. ____, 95 S.Ct. 2330, 2335 (1975).

fundamental of a prisoner's interests – the interest in personal liberty and freedom from oppressive conditions of incarceration. In the words of Mr. Justice White:

> But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

Involuntary transfers – as much as any other sanction that this Court has deemed requisite of due process protection – abridge interests of "real substance" and are "sufficiently embraced within Fourteenth Amendment 'liberty' to entitle [the prisoner] to those minimum procedures appropriate under the circumstances and required by the Due Process Clause. . . ." *Wolff v. McDonnell, supra*, at 557; *Morrissey v. Brewer, supra* at 481. To suggest otherwise is to draw tight the curtain to which Mr. Justice White alludes.

The petitioners' assertion that "The Commissioner is specifically empowered by statute to 'transfer inmates from one correctional facility to another' " (Br. for Pet. 8),[14] without regard to the Fourteenth Amendment, is

[14]The Solicitor General, conceding that the respondent was the subject of a disciplinary transfer (Br. for the United States as *amicus curiae*, 1), expands on that assertion by saying that a prisoner has no constitutional "liberty interest in being free of potentially less advantageous circumstances in a different prison, even if the difference amounts to 'grievous loss' " and that arbitrary transfer decisions or factually mistaken decisions "while unpleasant" are not "barbaric". (*Id* at 8) Presumably, they argue that the Constitution only deals with barbarism.

analogous to the position taken by the State of Nebraska when they claimed "that the procedure for disciplining prison inmates for serious misconduct is a matter of policy raising no constitutional issue." *Wolff v. McDonnell, supra* at 555. This Court answered Nebraska's claim by reaffirming that "the touchstone of due process is protection of the individual against arbitrary action of government." *Wolff, supra* at 558.

"It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer, supra* at 481. Accordingly, hearings to determine continued eligibility for public assistance must afford the rights of confrontation and cross-examination and the assistance of retained counsel, but do not require the appointment of counsel, *Goldberg v. Kelly*, 397 U.S. 254 (1970); hearings looking toward revocation of probation or parole may, on finding of good cause by the hearing officer, withhold the rights of confrontation and cross-examination, *Morrissey v. Brewer, supra* at 487-89, but there is a right to appointed (as well as retained) counsel in certain designated circumstances, to be decided on a case-by-case basis, *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973); inmates facing prison disciplinary proceedings have no absolute right of confrontation, but are afforded a limited right to call witnesses on their behalf and to have the assistance of a counsel-substitute, *Wolff v. McDonnell, supra* at 567-70; students facing public school disciplinary proceedings need not be afforded the right to call supporting witnesses (nor, *a fortiori*, are they entitled to the rights of confrontation or legal assistance), but they do

ordinarily have the right to prior notice and an opportunity to appear personally to present their version of events, *Goss v. Lopez*, 419 U.S. 565, 581 (1974).

These cases illustrate the flexibility of due process and that the Fourteenth Amendment does not tolerate an absolute claim of "no due process" where a prisoner suffers grievous loss resulting from arbitrary government action. The flexible nature of procedural due process allows legitimate state interests to be protected without sacrificing the procedural protections which are essential to accurate fact-finding and freedom from arbitrary and punitive government action. In considering the question of the applicability of due process, it is clear that neither the fact that we are dealing with convicted prisoners, nor the fact that a prisoner has no statutory claim to confinement at a particular institution, is dispositive of the question.

> I have previously stated my view that a prisoner does not shed his basic constitutional rights at the prison gate, and I fully support the Court's holding that the interest of inmates in freedom from imposition of serious discipline is a "liberty" entitled to due process protection. *Wolff v. McDonnell, supra* at 580. (Marshall, J. dissenting in part)

And "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege.' *Graham v. Richardson*, 403 U.S. 365, 374 (1971)." *Morrissey v. Brewer, supra* at 481.[15]

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[15]The Solicitor General attempts to resurrect the rejected right/privilege distinction by labeling the respondent's interest as a privilege while conceding the possibility of a punitive transfer and grievous loss. (Br. of United States as *Amicus Curiae*, 16-30)

The petitioners argue that "the New York statutory scheme refutes any claim of entitlement by an inmate to be placed or retained at any particular facility." (Br. for Pet. 9),[16] thereby suggesting that a prisoner only has a liberty interest when the state creates that interest by statute. This Court has said that "We think a person's liberty is *equally protected, even when the liberty itself is a statutory creation* of the state.", *Wolff, supra* at 558 (emphasis added) and went on to point out that it is protection "against arbitrary action of government" that is "the touchstone of due process." *Id* at 558.

The First Circuit Court of Appeals, in a post-*Wolff* transfer decision, properly identified[17] the prisoner's interest which requires due process safeguards:

> There were specific findings made by the district court as to the treatment of the transferees seeking relief in this case. The court found that the transferred inmates were segregated in the receiving prisons for two to six weeks, were placed in work assignments inconsistent with their prior experience, were precluded from rehabilitative and educational programs, saw few of their friends and family, and none of them saw their attorneys. Finally, the court found that parole opportunities were affected. 490 F.2d at 1213. We concluded that, beyond these specific findings, transfer inherently involves discontinuity of program, difficulty of communication, administrative isola-

[16]The Solicitor General makes this same obfuscatory claim. (Br. for United States as *amicus curiae*, 16).

[17]This identification highlights the appropriateness of the action of the court below in remanding this case to the District Court for an evidentiary hearing.

> tion pending integration into the new prison community and the possibility of a "trouble-maker" status which might occasion an unfavorable parole decision. It suffices here to say that the presence of privations which are either identical to or comparable to punishments meted out for disciplinary infractions calls for some due process safeguards in interstate transfer cases. *See Wolff, supra*, 418 U.S. at 571, 94 S. Ct. at 2982 n. 19.
>
> *Gomes v. Travisono*, 510 F.2d 537, 539 (1st Cir. 1974).[18]

B. Post-Wolff Transfer Law

This Court's landmark decision of *Wolff v. McDonnell, supra*, has served as the guidepost for at least six United States Courts of Appeals and six United States District Courts which have since issued opinions concerning prisoner transfers.[19] *Gomes v. Travisono*, 490 F.2d 1209 (1st Cir. 1973, vacated and remanded, 418 U.S. 908, on reconsideration, 510 F.2d 537 (1974); *Stone v. Egeler*, 506 F.2d 287 (6th Cir. 1974); *Ault v. Holmes*, 506 F.2d 288 (6th Cir. 1974); *Fano v.*

[18]It is also clear as the court below pointed out, that a serious equal protection violation would occur if prisoners were provided some procedural due process at a disciplinary hearing for certain conduct, but were transferred without any due process for the same conduct. "But it would be anomalous indeed, 'both from a due process and an equal protection point of view, if the prison authorities could accomplish by transfer a procedure-free punishment which they could not accomplish within their own walls.' " (A. 36)

[19]A number of federal courts ruled that the due process clause applied to prisoner transfers even before this Court's decision in *Wolff*. See for example, *Gomes v. Travisono*, 490 F.2d 1209 (1st Cir. 1973) and the cases cited therein.

Meachum, ____ F.2d ____, Civ. No. 75-1033 (1st Cir. June 27, 1975); *Fajeriak v. McGinnis*, 493 F.2d 468 (9th Cir. 1974); *Carlo v. Gunter*, ____ F.2d ____, Civ. No. 75-1163 (1st Cir. August 4, 1975); *McLaughlin v. Hall*, ____ F.2d ____, Civ. No. 74-1148 (1st Cir. June 27, 1975); *Walker v. Hughes*, 386 F. Supp. 32 (E.D. Mich. 1974); *Robbins v. Kleindienst*, 383 F. Supp. 239 (D.C.D.C. 1974); *Clonce v. Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974); *Rosenberg v. Preiser*, 388 F. Supp. 639 (S.D.N.Y. 1975); *Tai v. Thompson*, 387 F. Supp. 912 (D. Hawaii, 1975); *Daigle v. Hall*, 387 F. Supp. 652 (D. Mass. 1975). Each court has found that the principles of due process as applied in *Wolff* should apply with equal force to prisoners who will suffer grievous losses as a result of their transfer from one prison to another. In at least two cases, *Daigle v. Hall, supra*, and *Carlo v. Gunter, supra*, the courts applied those principles to disciplinary transfers within one prison's walls and *Stone v. Egeler, supra*, involved an intrastate transfer from one maximum security prison to another.

C. The Motive For The Transfer[20]

The importance of an evidentiary hearing is illustrated by the need to distinguish between the label

[20]Even if one were to accept the petitioners' "no entitlement" argument, an argument we believe erroneous, certainly if an evidentiary hearing disclosed that the respondent was transferred (punished) for engaging in constitutionally protected activity (his First Amendment right to protest prison conditions and his Sixth Amendment right to petition the court for redress) as he alleges

affixed by the state to its action and the actual motivation for the action taken. Many of the post-*Wolff* transfer cases concerned to some extent the plight of a prisoner, who, unlike respondent Haymes, had not been transferred for "disciplinary" reasons, but who had suffered grievous losses nonetheless because of the inherently punitive aspects of the transfer process.[21] As

(A. 3, 19), he would be entitled to relief against improper official action.

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible.
>
> *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

The Solicitor General concedes that much. (Br. for United States as *Amicus Curiae*, 25, n. 12)

[21]This includes all the cited cases with the exceptions of *Robbins v. Kleindienst*, *Rosenberg v. Preiser*, *Fajeriak v. McGinnis*, and *Daigle v. Hall, supra*, which focused to some extent on the punitive motive behind the transfers. These cases correspond even more readily to respondent Haymes' allegations. But see *Tai v. Thompson, supra*, in which the court found an inmate's transfer similar in loss of liberty to solitary confinement, thus requiring *Wolff*-type hearings despite the absence of allegations of punitive motive. 387 F. Supp. 912, n. 12.

required by *Wolff, supra* and *Morrissey, supra*, each court based its decision on a careful analysis of the nature of the losses suffered by the prisoner, rather than on the stated purpose of the proposed transfer. The First Circuit found that

> [s]ince the disadvantages to the inmate flowing from an interstate transfer are substantial, whether it be characterized as punitive, administrative, or rehabilitative, the same safeguards should be available in all such cases. *Gomes v. Travisono*, 510 F.2d at 541.

In *Fano v. Meachum, supra*, the Court of Appeals stated, "It should not escape notice that, aside from the distinction above, [the fact that in *Gomes*, the inmates endured a major geographical displacement and administrative segregation resulting from an interstate transfer] the consequences of intrastate and interstate are for the most part indistinguishable." Slip opinion at 6.[22]

[22]The Solicitor General quotes at length from Judge Campbell's dissent in *Fano* (Br. for United States as Amicus Curiae, 28-30) but neglects to include the penultimate paragraph of the dissenting opinion:

> Nonetheless, while the greater good of the institution and its other inmates may require that administrators retain broad transfer power, there can be no reason to permit an inmate's parole chances to be diminished by derogatory information he is never allowed to meet. This is a separate and different question. If Parole is a "liberty" right entitling an inmate to fair procedures, I would forbid the use of the fact of transfer by the parole board unless the charges upon which the transfer was based were established in a manner comporting with due process. Slip op. 13.

As we point out in the next section, this may be precisely what happened to the respondent at his first parole hearing.

The *Walker, Clonce*, and *Robbins* decisions were less concerned with the fact that the transfers were interstate, than with identifying the losses resulting from the transfers. They also looked at motive according to the rationale of *Wolff* that "there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction." *Wolff v. McDonnell*, 418 at 571, 572, n. 19.

Each court reached that conclusion after finding that involuntary transfers, whether categorized as "disciplinary" or as "classification", resulted in loss of personal property, legal papers, and medical records; delay in parole hearings or denial of parole; placement in "administrative" segregation upon arrival at the receiving prison which was no less restrictive than "disciplinary" segregation; loss and diminution of correspondence and visiting opportunities; change, and often loss of program opportunities; the delay and often the denial of statutory entitlements, such as good time credits, furloughs and work-release programs.[23]

The petitioners contend that there cannot be a disciplinary or punitive transfer in the New York penal system because "transfers are not among the penalties which can be imposed after prison disciplinary hearings." (Br. for Pet. 9)[24] That, respondent submits,

[23]Many of these losses were described as possible injury suffered by the respondent Haymes in the Court of Appeals decision below. (A. 37, 38) These losses will be discussed in greater detail in a separate section, *infra*.

[24]The petitioners elaborated on this contention in the oral argument before this Court in *Preiser v. Newkirk*, No. 74-107, ____ U.S. ____, 95 S.Ct. 2330 (1975) (transcript of oral argument, pp. 14-17, 59, January 20, 1975).

However both the American Correctional Association (Manual of Correctional Standards 416, 1972) and the United States

is merely a process of labeling by which the state attempts to create "a distinction too gossamer-thin to stand close analysis." *Johnson v. Chairman*, 500 F.2d 925, 928 (2nd Cir. 1974), vacated as moot *sub. nom. Regan v. Johnson*, 419 U.S. 1015 (1975). The substance of the petitioners' argument is that they wish to retain the option of how to deal with alleged misconduct by prisoners. Thus, if the State of New York wishes to punish a prisoner for circulating a petition in "direct violation of [the] prison rule" (Br. for Pet. 4) or "because of his illicit activities in the law library,"[25] they apparently cannot use transfer as a

Bureau of Prisons (Policy Statement No. 7400.5D, Inmate Discipline) recognize that transfer is an appropriate disciplinary sanction. Indeed, the Bureau of Prisons provides a prisoner with due process before a disciplinary transfer.
(Br. for United States as *amicus curiae*, 3)

[25]The petitioners assert various claims which are outside the record in this case. For example, "Haymes was not subjected to disciplinary confinement or the forfeiture of good-time credits," (Br. for Pet. 12) and "It is speculative in the extreme to imagine that the mere notation that an inmate has been transferred carries a negative inference." (Br. for Pet. 16) Similarly, the Solicitor General states that "no notation was made in his [respondent's] records that would reflect adversely on his behavior or diminish his opportunities for parole." (Br. for United States as *amicus curiae*, 5)

In order to present a fair picture to the Court, respondent is compelled to attach as Appendix 1 to this brief a copy of an official document of the State of New York, Department of Correctional Service, which appears in respondent's file. This document, referring to the June 9, 1972 transfer from Attica, states that "the transfer was necessitated because of his illicit activities in the law library."

This document places in conflict the petitioners' assertion that the respondent was transferred because he was circulating a petition in violation of a prison rule as well as the respondent's claim that he neither violated that prison rule nor did he do anything "illicit" while employed in the law library.

sanction (Br. for Pet. 9) if they comply with this Court's mandate in *Wolff*. They merely label the transfer as administrative and not disciplinary, thereby bypassing the requirement for procedural due process.

This labeling argument has been advanced before and has been given short shrift by the courts. In *Howard v. Smith*, 365 F.2d 428 (4th Cir. 1966) the court rejected an argument that confinement in a maximum security ward was not "punishment" but merely "segregation." The court went on to find that while segregated confinement is not as harsh as solitary, the limitation of certain privileges required due process. The rejected argument is markedly similar to the one put forward by petitioners. And in another transfer case, where the state attempted to distinguish between "disciplinary" and "administrative" transfers, the court said that "Administration by label is as abhorrent as is jurisprudence by label – unjust results readily occur under either approach. Affixing a label to determine the outcome may well also mask or conceal the interests involved. An identification of those interests is vital if they are to be protected from grievous harm or loss." *Kessler v. Cupp*, 372 F. Supp. 76, 77 (D. Oreg. 1973). See also, *Gomes v. Travisono*, 490 F.2d 1209, 1215 (1st Cir. 1973).

Having moved beyond the petitioners' label and clearly illustrated the need for some fact-finding procedure to determine which of the alleged wrongful acts the respondent was being punished for, and whether or not he committed any wrongdoing, we turn now to the question of injury.

D. Transfer and Grievous Loss[26]

It would be simplistic to examine the question of grievous loss merely by looking at the security levels of the prisons in question as suggested by the petitioners. That would ignore the reality of prison life. The Court of Appeals was correct in refusing to "condone the idea that the mere fact of incarceration permits a prisoner to be punished at the whim of those charged with his confinement." (A. 28)

This Court has already held that the loss of good-time credits is a "liberty" interest "sufficiently embraced within [the] Fourteenth Amendment . . . to entitle him [the prisoner] to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Wolff v. McDonnell*, 418 U.S. at 557. The State of New York has created by statute a right to earn good-time credits.[27] The petitioners argue that the respondent

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[26]The petitioners dwell on their claim that the respondent did not specifically allege the kinds of injuries that the Court of Appeals discussed in the opinion below. (A. 37, 38) We have already reviewed the *Haines v. Kerner* standard which must be applied to a *pro se* prisoner's complaint in Section II, *supra*. Furthermore, the *pro se* complaint, among other things, sought damages. It is difficult to conceive of how one might claim damages without suffering injury.

[27]7 NYCRR § § 260-61, N.Y.CORR.L

§ 803. Good behavior allowances against indeterminate sentences

1. Every person confined in an institution under the jurisdiction of the state department of correction serving an indeterminate sentence of imprisonment, except a person serving a sentence with a maximum term of life imprisonment, may receive time allowances against the maximum term of his sentence not to exceed in the aggregate one-third of the term imposed by the court. Such allowances may be granted for good behavior and efficient and willing performance of duties assigned or progress and achievement in an assigned treatment program, and may be withheld, forfeited or cancelled in whole or in part for bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned.

N.Y. Corr. L. § 804 is an analogous provision for good behavior allowances against definite sentences.

"Haymes was not subjected to disciplinary confinement or the forfeiture of good-time credits." (Br. for Pet. 12) On the record before this Court, as well as the two lower courts, there is no way of knowing whether that claim is true.

Furthermore, assuming *arguendo* that the respondent lost no good-time as a direct punishment for the alleged misconduct which led to his transfer, his early release on good-time could still be affected by the transfer. In New York, an in-prison committee called the Time Allowance Committee has the power to determine how much lost good-time is restored to a prisoner after he serves two-thirds of his maximum sentence. Since a record notation of a punitive transfer and the reasons therefor[28] can significantly affect the thinking of the Time Allowance Committee, the mere motation may be enough to reduce the ultimate good-time allowance and inflict grievous loss.

The petitioners, while denying that there is anything in the respondent's file concerning the transfer which

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[28]As we point out in the footnote on p. *21*, *supra*, such a notation exists in the respondent's records. See Respondent's Appendix 1.

could affect his parole, appear to concede that the respondent would suffer serious injury if his parole chances were affected. (Br. for Pet. 16, 17)[29] As we previously indicated, there is in the respondent's file, a document[30] which states that the was transferred for "illicit activities." The Court of Appeals wisely pointed out that "the fact of transfer, and perhaps the reasons alleged therefor, will be put on the record reviewed by the parole board, and the prisoner may have difficulty rebutting, long after the fact, the adverse inference to be drawn therefrom" (A. 37)

The respondent first became eligible for parole in July of 1974, two years after the disciplinary transfer. The decision at that Board of Parole meeting was that the respondent be "held to 7/75 Board with improved [disciplinary] record.[31] He appeared before the Parole Board again in July of 1975 and again the decision was that he be "held 9 months for improved [disciplinary] record."[32] We have no way of knowing of course whether the Parole Board based its decision on the record of the transfer for "illicit activities in the law library", but it is certainly a reasonable hypothesis. This is quite different from the situation this Court found in

[29]The Solicitor General appears to share this view by saying that "no notation was made in his records that would reflect adversely on his behavior or diminish his opportunities for parole." (Br. for United States as *amicus curiae*. 5)

[30]Respondent's Appendix 1.

[31]A copy of the July 1974 Parole Board Decision Notice is attached as Appendix 2 to this brief.

[32]A copy of the July 1975 Parole Board Decision Notice is attached as Appendix 3 to this brief.

Preiser v. Newkirk, supra, where there was a "specific record notation that the transfer [of the prisoner] should have no effect on good time or parole decisions . . .". 95 S. Ct. at 2335.

In a case involving mass transfers, the First Circuit said that "the authorities should expunge the fact of transfer from that plaintiff's record or at least include a notation that the determination had been made under emergency conditions not comporting with due process so that there should remain no continuing adverse impact by reason of the transfer on plaintiff's opportunities for . . . parole." *Carlo v. Gunter*, ____ F.2d ____, Civ. No. 75-1163, slip op. at 7 (1st Cir. Aug. 4, 1975). And as Judge Campbell said "there can be no reason to permit an inmate's parole chances to be diminished by derogatory information he is never allowed to meet." *Fano v. Meachum, supra*, slip op. at 13 (dissenting opinion). The record in this case is at least clear that derogatory information exists in the respondent's file and he has never been allowed to challenge its accuracy.

One of the respondent's most serious injuries, as a result of the transfer, was his separation from family and friends. Haymes is a resident of Buffalo, New York, where his parents and two brothers reside. He was transferred from Attica which is outside of Buffalo, to Clinton, several hundred miles away. Consequently, his ability to receive visits from his family and friends was seriously diminished.[33]

[33]Indeed, this injury is acknowledged by petitioners' own records. See Appendix 1 to this brief. This document from the respondent's file states that if the respondent were returned to Attica "it would be possible for him to receive more visits than at Clinton because his family resides in Buffalo. Perhaps his motivation would thus be increased." The document is signed by respondent's Correction Counselor and the Superintendent (Warden) at Clinton.

The positive rehabilitative effects of visits from family and friends has been noted. *Pell v. Procunier*, 417 U.S. 817 (1974). In *Ault v. Holmes*, 506 F.2d 288, 289 (6th Cir. 1974) the court stated "... [I]nterstate transfers might adversely affect plaintiff's chances for parole, would make visits of family and friends more difficult, and would require new adjustment to a different institution." When considering the effect on visitation in a state as large as New York, the distinction between interstate and intrastate transfers diminishes.

This Court, in *Procunier v. Martinez*, 416 U.S. 396 (1974);[34] *Pell v. Procunier, supra;* and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) has shown great reluctance in curtailing visitation and correspondence rights of prison inmates. Yet allowing punitive summary transfers would impower prison officials to effectively inhibit those rights. Such a ruling would allow prison officials to do summarily what the Constitution forbids by regulation.

It is also sound penal policy to place an inmate close to his community. The Federal Bureau of Prisons has enunciated a policy of attempting to place inmates near his or her place of residence.[35] Furthermore, the present Correction Commissioner of New York recently stated:

[34]In *Procunier v. Martinez*, the Court recognized that interference with communication between prisoners and their families "...necessarily impinges on the interest of each." because "the interests of both parties are inextricably meshed." 416 U.S. at ____, 94 S. Ct. at 1809. Thus, the interests of respondent's parents and brothers are involved in this case as well.

[35]Bureau of Prisons, Policy Statement No. 7300.13E, dated June 16, 1975.

> Our prisons now are all maximum security, like concentration camps if you will, ... My job is to get the prisoner out of the giant institutions like Attica and into the community. That's why I'm pushing – with Gov. Carey's help – a program of opening small community facilities, so we can get the inmates nearer their families. Hell, an inmate lives for visiting day. You can't have too many visitors when your family is in New York City and you're up in Attica. Getting the inmates close to home – that's our goal and we're hoping to convince communities that it's best for them.
> –Commissioner Ward as quoted in *New York Daily News*, August 18, 1975 at 30.

A number of recent studies conclude that it is within the state's interest of reducing recidivism, encouraging rehabilitation, and reintegration of an offender into society to incarcerate people near their home community. The National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, Standard 11, 354 (1973) lists as one of the "serious disadvantages" in constructing institutions in sparsely populated areas: "3. The prolonged interruption of offender's contacts with friends and relatives, which are important to the reintegration process." W. Nagel, *The New Red Barn: A Critical Look at the Modern American Prison*, 184 (1973)[36] lists eight reasons for the desirability of locating penal institutions near major population centers. Foremost on that list, he stresses such a location would facilitate easier visitation by relatives.

[36]This book resulted from a study made by Mr. Nagel and the American Foundation's Institute of Corrections at the request of the Department of Justice, Law Enforcement Assistance Administration (LEAA).

While little is known by penal experts on the reasons for recidivism, most all agree that availability of a job and close proximity of family are the best assurances against it. These means to the end of reintegration into society are furthered by placement of the inmate near his residence. Visitation is perhaps the most important link of an inmate to his family and community. To transfer an inmate, thus straining his access to the community, is self-defeating to the supposed rehabilitary function of a sanction. As far back as 1958 the United Nations recognized the importance of prisoner-family relations.

> § 79. Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his family as are desirable in the best interests of both.
> § 80. From the beginning of a prisoner's sentence consideration shall be given to his future after release and he shall be encouraged and assisted to maintain or establish such relations with persons or agencies outside the institution as may promote the best interests of his family and his own social rehabilitation.
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> United Nations Department of Economic and Social Affairs, *Standard Minimum Rules for the Treatment of Prisoners and Related Recommendations* § § 79-80, at 80 (U.N. Publication, Sales #: 1956.IV.4, 1958).

More recent studies in the United States confirm this proposition.

> Within the terms of imprisonment imposed, there is a growing and determined effort to break down the prison walls in the sense that the walls keep community influences out. It is recognized

> that every effort must be made to preserve any social ties the prisoner may have. Hence, restrictions are fewer on regular visiting, censorship of prisoners' mail is ending. . . . There emerges a serious commitment, particularly for the bulk of less threatening prisoners, to the reduction of their social isolation.
>
> N. Morris, *The Future of Imprisonment*, 8-9, U. of Chicago Press (1974).

Staff and inmates alike spoke to us of the importance of visiting. It is usually the principal remnant of any direct, personal relationship with the outside world. The old policies based on maximum separation of the inmate from the influences of the outside world have been discredited. Today most correctional officials recognize that outside contacts are not only desirable but necessary. Offenders are humans, and humans are social beings. – W. Nagel, *supra* at 102.

> Whether a person is confined across town in a jail or across the State in a prison, confinement totally disrupts his relationship with his community. The longer confinement persists, the more alienated the individual becomes. Strained ties with family and friends increase the difficulty of making the eventual transition back to the community. . . .
>
> Correctional authorities should not merely tolerate visiting but should encourage it. This extends to providing or paying for transportation when the cost of traveling to the facility would be a limiting factor. Such a provision is plainly needed to equalize the situation of rich and poor inmates. Expenses of this type can be minimized by incarcerating offenders in their own community or through expanded use of furlough programs. –

National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, Standard 2.17, at 68 (1973) (hereinafter, *Corrections.*)

It follows logically, that transfer, which in this case drastically reduced the frequency of visitation Haymes enjoyed, is a serious sanction. The National Advisory Commission, *Corrections, supra,* Standard 2.13 specifically disdains the use of transfer as a sanction.

> Each correctional agency should immediately promulgate written rules and regulations to prescribe the procedures for determining and changing offender status, including classification, transfers, and major changes or decisions on participation in treatment, education, and work programs within the same facility.
>
> * * *
>
> 2. The offender should be permitted to make his views known regarding the . . . transfer, . . . under consideration. . . .
>
> * * *
>
> 4. Proceedings for nondisciplinary changes of status should not be used to impose disciplinary sanctions or otherwise punish offenders for violations of rules of conduct or other misbehavior.

Transfer as a sanction for misconduct imposes grievous loss and requires some due process.

In addition to severing ties with family and friends, a transfer over any distance may subvert an inmate's relationship with counsel. Many inmates establish ties with local attorneys subsequent to their institutional placement. An attorney who has represented an inmate since his incarceration will have increased difficulties preparing the inmate's legal matters. In addition,

important correspondence between the inmate's attorney and the inmate will inevitably be delayed, possibly lost, while the inmate, (who had no notice to advise expected correspondents) is shuffled about the state's penal system. This effective interference with prisoner correspondence by "arbitrary governmental invasion" directly opposes the dictates of this Court in *Procunier v. Martinez, supra.* Thus disciplinary transfers may serve to inhibit an inmate's Sixth Amendment right to counsel.

Federal courts have also consistently recognized that assignment to disciplinary segregation requires due process protection for the inmate. See, e.g. *Wolff v. McDonnell*, 418 U.S. at 571, n. 19; *Carlo v. Gunter*, Civ. No. 75-1163 (1st Cir. 1974); *United States ex rel Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973); *Daigle v. Hall*, 387 F. Supp. 652 (D. Mass. 1975). Courts have recognized the grievous loss suffered by an inmate who is separated from the rest of his community.

> In the prison context, except for the loss of life itself and except for the imposition of those conditions which would constitute cruel and unusual punishment in violation of the Eighth Amendment, confinement in punitive segregation is as loathsome and wretched as is legally permissible; there is nothing worse.
>
> *Sands v. Wainwright*, 357 F. Supp. 1062, 1082 (M.D. Fla. 1973)

Respondent submits that a transfer, while not necessarily worse, may be as adverse as punitive segregation. Like punitive segregation, the transferred inmate is removed from his friends and acquaintances within the prison, suffering the same feelings of

loneliness and alienation.[37] Like punitive segregation, the transferred inmate loses the last scintilla of control over his ever constricting environment. In effect, therefore, the punitive transfer acts much like solitary confinement.

Added to respondent's possible grievous loss would be the disruptive effect of summary punitive transfer to any ongoing medical care of the respondent, and any rehabilitative or educational programs in which he participated.[38] Such abrupt withdrawal from these programs is not only grievous loss to the respondent, but is detrimental to the state's interest in rehabilitation. With fair and adequate notice, the respondent could have made efforts to constructively terminate his participation in these programs, or provided for their continuation at Clinton. The latter possibility is suggested under the generous assumption that Clinton provides the same programs as Attica.

When considering program opportunities, it would be absurd to accept petitioner's assumption that all

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[37]Upon transfer, a prisoner is required to adjust to a new environment where he may be branded as a troublemaker. Summary transfers of prisoners considered to be troublemakers run counter to the interests of prison officials. The New York State Special Commission on Attica cites the regular practice of transferring inmates with leadership ability to keep them from developing a following as one of the many factors leading to the Attica Rebellion of 1971. *Attica: The Official Report of the New York State Special Commission on Attica*, 121 (1972).

[38]Because of the notation in his record concerning "illicit activities in the law library," the respondent has been refused work in the law library since 1972.

maximum security prisons are alike.[39] In *Stone v. Egeler*, 377 F. Supp. 115, 117 (W.D. Mich. 1973) *aff'd as modified*, 506 F.2d 287 (6th Cir. 1974) the District Court noted a significant difference between two maximum security institutions within the Michigan state penal system. The Court found the difference caused the transferred inmates grievous loss. On appeal, the Circuit Court held *Wolff*-type hearings were required. 506 F.2d at 288. Since respondent here was not afforded a hearing, no evidence was taken on the possible differences between Attica and Clinton.

Thus, "It suffices here to say that the presence of privations which are either identical to or comparable to punishments meted out for disciplinary infractions calls for some due process safeguards in. . . transfer cases." *Gomes v. Travisono*, 510 F.2d 537 (1st Cir. 1974).

E. The Interests of the Prisoner and the Interests of the Prison System.

At the outset, the Solicitor General makes a confusing argument for the government's interest as *amicus*. He first admits that the Bureau of Prisons requires *Wolff*-type hearings in cases of disciplinary transfer. (Br. of United States as *amicus curiae*. 3) Yet, he will not concede that the Constitution mandates such hearings. (Br. of United States as *amicus curiae*. 4)

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[39]At the oral argument before this Court in *Preiser v. Newkirk, supra*, the Assistant Attorney General for the State of New York said: "Now, in point of fact, there are no two institutions in New York that are exactly alike. . . ." (transcript of oral argument, p. 57, January 20, 1975).

He argues first, that a ruling requiring hearings in disciplinary transfers would interfere with other decisions the Bureau must make, and second, that it would "inhibit the continuing development and revision by the Bureau of its transfer procedures." (Id. at 4) Evidently, the Bureau of Prisons has not felt the need to engage in "continuing development and revision . . . of its transfer policies," at least not since Bureau of Prisons Policy Statement 7400.5C (promulgated Nov. 4, 1974), was superceded by 7400.5D (promulgated July 7, 1975). None of the provisions relevant to disciplinary transfer were altered, (with the exception of an additional provision, granting the appointment of a staff member to aid an illiterate inmate, or one faced with complex issues at a hearing, where all staff members decline him aid). Since *Robbins v. Kleindienst*, 383 F. Supp. 239 (D.D.C. 1974) (dismissed by stipulation, Nov. 27, 1974), the last case challenging the Bureau's disciplinary transfer policy which was ended by the Bureau's adoption of the November 1974 policy statement, the Bureau has not moved to alter their policy. Hence it is doubtful that the Bureau of Prisons will in any way be constricted by the Supreme Court requiring New York to meet the demands of the Fourteenth Amendment, which are already being met by the Bureau.

The Solicitor General further embellished this contradiction by suggesting that only when a transfer is explicitly based on specific infractions of an institution's rules are hearings provided, and then only to determine whether the infraction occurred, not whether the proposed transfer is an appropriate response.[40] He

[40]This statement by the Solicitor General may not be entirely accurate. Bureau of Prisons Policy Statement 7400.5D (9)(D)(6) states that in the case of an emergency transfer, a hearing must be conducted as soon as practicable, "to consider the factual basis of the charge of misconduct *and* the reasons for the emergency transfer." Policy Statement 7400.5D(9) (D) (6) at 14 (July 7, 1975) (emphasis added.) This language implies the Institution Disciplinary Committee will accept argument on the appropriateness of a transfer.

In addition, 7400.5D(10) provides an inmate with a right of appeal from an adverse decision by the Institution Disciplinary Committee. One of three factors that will be considered upon appeal is: "(C) Under the circumstances, was the sanction imposed disproportionate to the offense?"

goes on to say, "[W]e submit this fully comports with the requirements of the Due Process Clause." (Id. at 41) Logically, this implies the Due Process Clause requires hearings, and the Bureau's policy comports with that requirement.

In his brief, the Solicitor General cites *Robbins v. Kleindienst, supra,* as holding a requirement of adversarial hearings "for all transfers, regardless of the reasons they are carried out." (Br. for United States as *amicus curiae*, 31 n. 15) This reading of *Robbins* is erroneous. In that case the Court stated:

> The court has considered only the question of whether the standards enunciated for adjustment and closer custody-type transfers are sufficient. The court has not considered standards for other types of transfers since the named plaintiffs have only suffered from the disciplinary types of transfers and the standards regarding other types of transfers have not been fully addressed by the parties.
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> 383 F. Supp. at 250, n. 6.

Hence, that case dealt with a transfer similar to that of the respondent. *Robbins* held that hearings are required in disciplinary transfers. The Bureau of Prisons' response to that decision, to their credit, was to comply

and promulgate new policy pertaining to transfer, rather than appeal the District Court's decision. Bureau of Prison Policy Statement 7400.5C, Inmate Discipline, (Nov. 4, 1974) *since superceded by* 7400.5D (July 7, 1975).

Respondent submits that the State of New York would do well to follow the Bureau of Prisons' lead in proposing regulations agreeable to the Due Process Clause. In another post-*Wolff* transfer case involving the Bureau, *Clonce v. Richardson, supra*, the court held that as long as injury resulted, a transfer need not be punitive to require a *Wolff*-type hearing. Although against the interests of the Bureau of Prisons that the Solicitor General posits, the Bureau did not appeal that decision either. Thus, it would seem that the Solicitor General is taking a position contrary to the Bureau of Prisons by advocating denial of due process in disciplinary transfers.

The Solicitor General argues that use of adversarial hearings should be minimized within prisons. He advances two reasons: First, ". . . hearings may hamper the ability of institutions to rehabilitate the inmates," and second, ". . . they may also increase the risk of violence by disappointed inmates." (Br. for United States as *amicus curiae*, 42)[41] In support of his reasons,

[41] The petitioners do not advance either of these arguments, but rather, joined by the State of California, as *amicus curiae*, make the claim of administrative inconvenience and inadequate resources. (Br. for Pet. 10, 18) (Br. for California as *amicus curiae*, 7) The Federal Bureau of Prisons has more institutions and more prisoners than either New York or California and apparently has no difficulty in providing due process hearings in connection with disciplinary hearings.

Furthermore, this Court has not hesitated to require compliance with the Constitution in the face of similar claims. See *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972).

he argues that inmates' ". . . refusal to accept guilt for wrong doing often is accompanied by a concomitant refusal to accept the legitimacy of the authority of their custodians and a tendency to project into the custodians blame for all events occurring in prison." (Id. at 44) Thus, he reasons, the potential for violence as a means of resolving problems, "could be increased to an unknown degree by the injection of advance notice and formal hearings into major portions of prison administration." (Id. at 44).

This Court, in *Wolff v. McDonnell*, 539 U.S. at 562, acknowledged the existence of these difficulties, but nevertheless rejected them as an absolute bar to providing prisoners with disciplinary hearings. Similarly, the Chief Justice has written that due process is integral to the State's legitimate interest in rehabilitation.

> And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.
>
> —*Morrissey v. Brewer*, 408 U.S. 471, 484 (1972) *(dictum)*.

The Solicitor General relies on an early prison case for his argument. *Sostre v. McGinnis*, 442 F.2d 178, 197 (2d Cir. 1971), cert. den. *sub nom Sostre v. Oswald*, 404 U.S. 1049 (1971). In addition to this Court's later decisions in *Wolff* and *Morrissey*, and the decision of the court below, two other circuit courts have specifically rejected this argument. In weighing the interests of the state against those of the prisoner, the First Circuit said:

> Time has proved, however, that blind deference to correctional officials does no real service to them.

> Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly. (footnote omitted)
>
> – *Palmigiano v. Baxter*, 487 F.2d 1280, 1283 (1st Cir. 1973).

In a case involving disciplinary proceedings at San Quentin, the Ninth Circuit also invoked the traditional balancing test. One factor tipping the scale in favor of due process was the interest of society. In *Clutchette v. Procunier*, 497 F.2d 809 (9th Cir. 1974), the court said:

> The need for conservation of public financial resources is real. However, the interest in savings that can be realized from depriving prisoners of minimum procedural safeguards designed to enhance fair fact finding is outweighed by the larger public interest in rehabilitating offenders and by the individual prisoner's interest in clinging to the remnants of his liberty. The Supreme Court has recognized the linkage between the rehabilitative goals of correctional hearings utilizing nonsummary procedures which are fair and which appear fair to the offender. (footnote and citations omitted.)
>
> –497 F.2d at 816.

The court went on to state:

> As we have earlier pointed out, the rehabilitative goal is improved, not impaired, by imposing procedural protections designed to thwart arbitrariness and to enhance the quality of fact finding. A prisoner who receives what he reasonably views as unfair or arbitrary treatment from prison authorities is likely to become a difficult subject for reformation or even for efficient custody. (citations omitted)
>
> We conclude that, except in emergency situations, the inmate's interest in preserving his slight liberty and his property and the public interest in reaching the rehabilitative ends of corrections outweigh any competing interests that could be promoted by preserving summary proceedings in the conduct of San Quentin's disciplinary hearings.
>
> –497 F.2d at 817.

There can be little doubt that a prison full of people laboring under the kafkaesque apprehension of summary transfer would be counterproductive at best. The notion of unfairness would further embitter the individual transferee. If the state transfers an inmate because of his disruptive effect on the institutions, it would not serve state interests to increase his animosity before placement in a new prison.

The National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, 556 (1973) section on Administrative Justice (§ 16.2) advises expansion of open hearings for just the reasons stated above.

> In many instances, a grievance procedure that has the confidence of the offenders will alleviate the need to utilize more formal and time-consuming methods of testing the appropriateness of correctional decisions. Most correctional institutions do have grievance procedures. Often, they are informal and distrusted by offenders. The close confinement characteristic of most adult prisons

and the regulation of all aspects of the lives of the inmates inevitably will lead to frustrations and grievances – some legitimate, others not. Unattended grievances lead to hostility, as dramatically illustrated at recent uprisings at institutions.

The development of formal grievance, discipline, and change-of-status procedures, while no assurance against further trouble within prisons, at least may alleviate some tensions that otherwise would exacerbate inmate uneasiness. In addition, known procedures operate as a check on the exercise of arbitrary power by institutional staff and keep top management aware of conditions within various facilities and programs.

A recent article, *Procedural Due Process in the Involuntary Institutional Transfer of Prisoners*, 60 Va.L.Rev. 333, 345-46 (1974), includes in a list of deprivations suffered by a transferee, his or her adjustment to new surroundings. The article states that this problem may be further augmented when the inmate was not adequately informed of, nor given a chance to contest, the basis of the transfer decision.

Many recent studies stress the importance of procedural due process in furthering the legitimate rehabilitative function of prisons as well as the anti-rehabilitative effect of the absence of such procedures. A leading corrections authority, David Fogel,[42] has written in an oft-cited treatise:

> The justice model seeks to engage both the keeper and the kept in a joint venture, which would force the agencies of justice to operate in a lawful and just manner. It simply means a belief

[42]Dr. Fogel is presently Director of the Illinois Law Enforcement Commission and former Commissioner of the Minnesota Department of Corrections.

> that the prisoner did not use lawful means outside the prison and should therefore be provided more (not fewer) opportunities to learn lawful behavior in the institution. The efforts of the staff should be geared to teaching a prisoner how to use lawful processes to achieve his ends, as well as to accept responsibility for the consequences of his behavior. In the absence of a continuum of justice in the prison, most ends are reached unlawfully. When unlawful behavior in the prison is detected, the standards of due process that we insist upon outside the prison are not applied. The result is a further indication to the convict that lawful behavior for a convict has little payoff. He can be dealt with arbitrarily and usually responds by treating others in the same manner. The justice model would make sure that the prisoner experienced lawful ways of dealing with problems with the expectation that there would be a carryover to the point of release. The prison experience would try to guarantee that at least for the period of incarceration the prisoner would be exposed to the type of lifestyle that society expects him to pursue when he is released.
>
> –Fogel, *The Justice Model for Social Work in Corrections*, Social Work Practice and Social Justice, 26, 32 (N.A.S.W. 1972).

The National Advisory Commission, *supra*, has clearly pointed to society's interest in the fair treatment of prisoners:

> A major factor in the oppressiveness of correctional institutions and other correctional process is the unchecked power government exercises over individuals committed to its custody. Constitutional standards embodying the principle that government efficiency is not of a higher order than individual freedom have been

flaunted, intentionally or misguidedly. Correctional efforts are undermined if an offender has not been, or does not believe he has been treated fairly and equitably. Hostility is generated against not only the correctional agency but the "system" including the society to which the offender inevitably returns.

—*Corrections*, at 556.

F. The Nature of the Process that is Due

If the Court holds, as we have argued, that the Due Process Clause applies to disciplinary transfers, the question then arises as to what process is due. The answer to the question can be found by looking at the policies of the Federal Bureau of Prisons which affords a federal inmate facing disciplinary transfer the equivalent of a *Wolff* hearing.[43]

Bureau of Prisons' Policy Statement 7400.5D(9)(c) states that "An inmate may not be placed in disciplinary segregation, have his good time withheld or forfeited, *be transferred to another institution for disciplinary reasons* . . ." (emphasis added) without the following procedures. A prisoner has the right to: (1) twenty-four hour written notice of charges; (2) representation by a full-time staff member, including

[43]It is important to note that under Bureau of Prisons' Policy Statement 7400.5D(8), Minor Dispositions, a disciplinary transfer is specifically excluded. Thus the Bureau considers a disciplinary transfer, like segregation and the withholding or forfeiture of good time (both are also excluded in Policy Statement 7400.5D(8)) to be major sanctions reserved for "serious misbehavior." *Wolff v. McDonnell*, 418 U.S. at 571, n. 19.

reasonable time for the staff member to interview the prisoner and prepare his case if necessary; (3) call witnesses and produce documents, if it would not jeopardize institutional security. If the committee declines to call a witness, the committee must document its reasons. If the prisoner waived representation by a staff member, he may submit questions to be put to the requested witness; (4) a (non-verbatim) record of the proceedings that document that the prisoner has been advised of his rights, the committee's findings, the committee's decision, specific evidence relied upon by the committee, a brief statement of the reasons for the sanctions imposed; (5) be present at the hearing, except at the committee's deliberation, and unless institutional security is jeopardized. If the prisoner is excluded, the committee must document their reasons.

The Bureau's policy statement also provides that "an inmate's file shall be expunged of the disciplinary report against him whenever he is found not to have committed a prohibited act (7400.5D(9)(f)) and further provides that a prisoner may appeal the committee's decision to the Warden, the Regional Director of the Bureau and to the Assistant Director of the Bureau (7400.5D(10)).

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be affirmed, or alternatively, the Court should decide that certiorari was improvidently granted and the petition should be dismissed.

Respectfully submitted,

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October 15, 1975

APPENDIX 1

STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICE

CLINTON CORRECTIONAL FACILITY

TO: COMMISSIONER OF CORRECTIONAL SERVICES
Date December 18, 1973

CLASSIFICATION COMMITTEE EVALUATION OF
INMATE TRANSFER TO:
Attica Correctional Facility
Auburn Correctional Facility
SUBJECT HAYMES, Rodney INST. NO.: CL46112
NYSIIS. NO: 957442J

The Classification Committee has reviewed and evaluated this inmate's case in accordance with the established criteria for selecting inmates for transfer to the correctional facility indicated above, and the following determination was made:

RECOMMENDED For Transfer ____X____
NOT Recommended For Transfer _____

REASON:

Rodney Haymes initial was received at this facility on 6-9-72 from Attica. The transfer was necessitated because of his illicit activities in the law library at that facility. Initially his behavior at this facility was "fair". However, during the past year his behavior has rapidly deteriorated. He has been in Special

Housing Unit #14 for seven consecutive months and has absolutely no inclination to participate in any program available here. He has expressed an interest in a transfer to Attica. If it isn't possible for him to return to Attica, he would like to go to Auburn. At either of these facilities it would be possible for him to receive more visits than at Clinton because his family resides in Buffalo. Perhaps his motivation would thus be increased. He has indicated to his Counselor and in a note to Deputy Superintendent Gard (see attached note from inmate) that he would indeed participate in all the programs available at either of the above facilities. He has been advised by his Counselor that if he is transferred that he will be expected to get involved in a positive manner. Additionally he has been told that failure to participate might result in his prompt return to Clinton.

It is felt that Rodney Haymes could benefit from a fresh start at another facility.

I.Q. 96

Minimum: 7/74; Maximum: 7-27-87; Conditional Release: 7-29-81

/s/ illegible
Correction Counselor

EVALUATION PROMPTED BY:

_____	Inmate letter to Commissioner (letter attached)
X	Inmate request to Institution Officials or Service Unit
_____	Classification Committee Procedure
_____	Other (Specify)

/s/ illegible
Superintendent

DCG-II

APPENDIX 2

STATE OF NEW YORK-DEPARTMENT OF CORRECTIONAL SERVICES

PAROLE BOARD DECISION NOTICE

Name HAYNES, Rodney Date JUL 24 197

Institution DANN 20443

Number

The Board of Parole at the _____ meeting rendered the following decision:

Held to 7/76 Bd with improved record.

APPENDIX 3

3/42

STATE OF NEW YORK-DEPARTMENT OF CORRECTIONAL SERVICES

PAROLE BOARD DECISION NOTICE

Name Rodney Haynes Date JUL 15 1975

Institution Attica Corr. Facility

Number 27739

The Board of Parole at the July 1975 meeting rendered the following decision:

Held 9 mths to improved record

4/76 Bd

Parole Officer

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

74-520

ERNEST L. MONTANYE, former Superintendent of Attica Correctional Facility, et al.,

Petitioners,

against

RODNEY R. HAYMES,

Respondent.

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

74-520

ERNEST L. MONTANYE, former Superintendent of Attica Correctional Facility, et al.,

Petitioners,

against

RODNEY R. HAYMES,

Respondent.

REPLY BRIEF FOR PETITIONERS

A.

Defendants agree with plaintiff Haymes (Res. Br. at 6-9) that with regard to his transfer claim, the District Court properly treated defendants' motion as a motion to dismiss, since no evidentiary material was submitted concerning that claim and defendants did not answer the complaint. Accordingly, at no point in the proceedings have defendants alleged the reason for the transfer nor have they made any claim regarding what material, if any, appears in Haymes' files regarding the transfer, as plaintiff now asserts (Res. Br. at 24, 27-28).*

* Haymes devotes a large portion of his brief to the propositions that his *pro se* complaint should be liberally construed and his allegations treated as true (Res. Br. at 6-14). Defendants treated his allegations as true for the purposes of their motion to dismiss. Although Haymes' complaint was *pro se*, he retained counsel at least seven months prior to the District Court's decision. No motion was made to amend the complaint.

Haymes further suggests that there is an issue in this case as to whether he received disciplinary confinement or the loss of good time credits in connection with the transfer (Res. Br. at 26-29). This is a startling proposition to be injected by plaintiff at this penultimate stage of the proceedings since the postulated issue in this case has always been limited to the constitutional significance, if any, of a transfer between two maximum security prisons without a hearing and with no imposition of disciplinary confinement or good time loss. Indeed, this case would not be before this Court had either penalty attached. According to the Department's own regulations in June, 1972 neither penalty could be imposed unless the inmate was first afforded a disciplinary hearing. It is certainly long since conceded that Haymes had no hearing at all.

Finally, Haymes blithely asserts that defendants have "abandoned" the defense of good faith immunity to the request for monetary damages (Res. Br. at 13 n. 12). This Court's recent decisions establish that the defense is one to be pleaded and proved, rather than asserted on a motion to dismiss. *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974). See *Wood* v. *Strickland,* 420 U.S. 308 (1975). Accordingly, if plaintiff prevails in this Court and the case is remanded, defendants will raise, and are in no respect precluded from raising, the defense of good faith immunity in their answer.

B.

Recognizing that the due process protection of the Fourteenth Amendment is inapplicable unless the State has affected a liberty or property interest, Haymes concedes that he has no property interest in his retention at any particular maximum security prison but propounds three possible sources for a protected liberty interest. None of his suggested possibilities withstands constitutional analysis.

1. Haymes first suggests that he has a liberty interest in protection from arbitrary governmental action, asserting that "the touchstone of due process is protection of the individual against arbitrary action of government." *Wolff* v. *McDonnell,* 418 U.S. 539, 558 (1974) (Res. Br. at 16-17). This assertion does not answer the question of whether or not an individual has a liberty interest because the principle logically emerges only after a determination has been reached that a protected interest indeed exists. Thus, the above-quoted portion of *Wolff* necessarily appeared after this Court's holding that the Nebraska inmates had a statutorily-created liberty interest in retention of their good time credits and preceded its analysis of what process was then due. 418 U.S. at 558.

There is, of course, no constitutional right to be free of all unilateral and possibly mistaken action taken by the government. It is only when an individual has a protected interest which is affected by the action that the principle comes into play. Indeed, any other conclusion would mandate that any and all governmental action be preceded by due process, a proposition clearly untenable under this Court's recent decisions. E.g. *Goss* v. *Lopez,* 419 U.S. 565 (1975); *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972). Haymes' proposition, then, merely begs the question of whether or not there is a liberty interest at stake in this case.*

Moreover, Haymes' contention assumes the existence of a factual predicate which if established could compel or prevent the proposed governmental action. However, as discussed in defendants' main brief (Pet. Br. at 8-9), there is no particular set of facts which would entitle Haymes to re-

---

* Similarly, the alleged punitive or disciplinary motivation for the transfer is irrelevant to the issue of whether or not a liberty interest exists. Surely the intent or motivation in the minds of governmental employees cannot constitutionally define an inmate's liberty interest.

main at Attica or mandate his transfer to Clinton. Rather, the Legislature of New York has empowered the Commissioner of Corrections to transfer inmates at his discretion. N.Y. Corr. Law § 23(1).

> "Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided . . . no conditions at all, no hearing is required." *Arnett* v. *Kennedy*, 416 U.S. 134, 181 (1974) (WHITE, J. concurring and dissenting) (citations omitted).

The prison authorities were free to transfer Haymes regardless of whether or not it was established that he had violated any prison rules; indeed, they were authorized to transfer him even if it were established that he had violated no rule.

2. Haymes also seeks a liberty interest in the proposition that he suffered a grievous loss as a result of the official action of which he complains (Res. Br. at 17, 20ff). But as defendants have discussed in their main brief (Pet. Br. at 13), the severity of the consequences of the challenged transfer are not part of the analysis for a protected interest; evaluation of grievous loss goes to the "weight" of the claimant's interest, not to its "nature." E.g. *Goss* v. *Lopez*, *supra*, 419 U.S. at 572-576; *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 570-571.

This Court's decisions clearly establish that there is no independent liberty interest created merely because an individual perceives suffered loss at the hands of the government. "The range of interests protected by procedural due process is not infinite." *Roth*, 408 U.S. at 570. For example, in *Roth*, this Court recognized that the teacher's continued employment was of substantial "interest" to him (*id.* at 570), but held that it was not constitutionally significant since no liberty or property interest was implicated. Similarly, injury to one's reputation may be of great importance to the individual affected and may be sufficient to

prevail in a state defamation action, but reputational injury, absent more, does not implicate a liberty or property interest protected by the Due Process Clause. *Paul* v. *Davis*, —— U.S. ——, 44 U.S.L.W. 4337 (March 23, 1976). Claiming grievous loss at the hands of the government begs the question at issue herein. The Due Process Clause does not extend to all governmental action which is adverse or is perceived as adverse by a particular individual but only to that action which affects a protected interest otherwise established.*

3. Haymes further suggests that his Fourteenth Amendment interest derives from the possibility of a notation in his record which might affect his release on parole or the accumulation of statutory good time credits** (Res. Br. at 26-29). See, e.g., *Fano* v. *Meachum*, 520 F. 2d 374, 378, 382 (1st Cir., 1975), *cert. granted*, No. 75-252, —— U.S. ——, 44 U.S.L.W. 3344 (December 8, 1975); *Carlo* v. *Gunther*, 392 F. Supp. 871, 878 (D. Mass. 1975), *vacated and remanded* 520 F. 2d 1293 (1st Cir. 1975). The fact that the transfer may later be taken into account does not mean that an inmate has a protected interest at the time of the transfer; indeed, the claim does not even relate to the procedure attached to the transfer but to mere speculation about future action with regard to an inmate's early release from custody.

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* As defendants have previously argued, the hypothetical adverse consequences propounded by Haymes and the Court of Appeals are not constitutionally cognizable as "grievous loss" (Pet. Br. at 14-17).

** Carried to its logical end, plaintiff's theory of the law would require notice and a hearing before each and every notation in an inmate's file which might be construed as non-complimentary, for example an evaluation of his performance on a job or perhaps even the fact of his placement in one job, such as kitchen duty, rather than another, such as librarian clerk. The consequences of such a theory are absurd and certainly not compelled by the Constitution. See *Fano* v. *Meachum*, *supra*, 520 F. 2d at 381. Cf. *Paul* v. *Davis*, *supra*, 44 U.S.L.W. at 4342.

Haymes was denied parole release on two occasions since his transfer, in July, 1974 and July, 1975 and asserts that he has "no way of knowing" if the Board based its decisions on events related to the transfer (Res. Br. at 28). See *post* at 8.* Haymes further suggests (Res. Br. at 27) that the granting or withholding of good time credits by the Time Allowance Committee (7 N.Y.C.R.R. Parts 261, 262) might be affected by transfer information in his record. The contention that Haymes has a protected interest derived from the possibility of a notation in his prison record does not withstand the constitutional analysis required by this Court's decisions, nor is it supported by facts of which this Court may take judicial notice.

Haymes has no protected interest established by the possibility that his earlier parole applications were affected by a transfer notation.** A decision denying an inmate early release does not deprive him of liberty; his liberty was withdrawn by his conviction. Indeed, he is in no danger of losing liberty, but to the contrary is seeking liberty. Nor has he any legitimate claim of entitlement to parole release. By statutory mandate the decision to parole is discretionary; no particular set of facts can compel a decision by the Board of Parole. N.Y. Corr. Law § 213, 7 N.Y.C.R.R. §§ 1910.5, 1910.15; *Matter of Brigulio* v. *New York State Board of Parole,* 24 N.Y. 21, 26-29, 298 N.Y.S. 2d 704, 708-

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* Haymes met the Board of Parole again on April 6, 1976. He was granted parole and will be released on April 13, 1976. His claim in this action survives since he sought monetary, not declaratory or injunctive relief.

** Haymes is without standing to speculate on the actions of the Time Allowance Committee because he was granted parole release long before a final decision was to be rendered by the Committee as to the granting of good time credits. Haymes' earliest possible statutory release date was 1981. Although the Committee met every three years to review his record, no final decision would have been made until the final meeting, held three months before the statutory release date. 7 N.Y.C.R.R. §§ 260.4(b), 261.3(a)(b), (g), 262.1 (b).

710, 246 N.E. 2d 512, 515-517 (1969); *Matter of Hines* v. *State Board of Parole,* 293 N.Y. 254, 56 N.E. 2d 572 (1944). In short, an inmate has no more than a "unilateral expectation" with respect to his parole release. See *Roth, supra,* 408 U.S. at 577.*

Moreover, the speculation that a transfer notation might affect parole release does not vest an inmate with procedural rights at the time of the transfer. If this Court holds that the Due Process Clause is applicable to parole release proceedings (*Scott* v. *Kentucky Board of Parole, supra*), the transfer can be considered by the Board at the time that it meets; the prisoner then would have the opportunity to challenge or explain the reasons for the transfer. In fact, New York law already requires that an inmate meet with the Board before it renders its decision. N.Y. Corr. Law § 214(4), (5); 7 N.Y.C.R.R. § 1910.10(a).

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* In the interest of brevity, defendants adopt and respectfully refer the Court to the briefs of the party states and United States as *amicus curiae* in *Scott* v. *Kentucky Board of Parole, cert. granted,* No. 74-6438, —— U.S. ——, 44 U.S.L.W. 3358 (December 15, 1975) and *Bradford* v. *Weinstein, vacated as moot,* —— U.S. ——, 44 U.S.L.W. 3372 (December 10, 1975), arguing that an inmate has no liberty or property interest in his parole release.

While defendants argue (*ante* at 6 n.**) that Haymes cannot rely on the possibility of an adverse decision regarding his good time credits, having been released on parole, they note that the above analysis as to parole release applies with equal force to New York's good time release program. Unlike the good time scheme before this Court in *Wolff* v. *McDonnell, supra,* 418 U.S. 539, New York's system is not mandatory. It does not require the granting of good time credits for good behavior and performance of duties, nor does it allow withholding only for serious misconduct. See *Wolff,* 418 U.S. at 545 and n. 6. Rather, the allowance is not an automatic award but "may be granted" for good performance or progress; the allowance is discretionary with the Time Allowance Committee, as in the parole system. N.Y. Corr. Law § 803(1); 7 N.Y.C.R.R. §§ 260.3(b), 261.3(e); *Bradley* v. *Ward,* 81 Misc. 2d 713, 716, 366 N.Y.S. 2d 841, 844 (Sup. Ct. Albany Co. 1975); *People ex rel. Bright* v. *Ward,* 79 Misc. 2d 959, 962-964, 361 N.Y.S. 2d 809, 813-815 (Sup. Ct. Bronx Co. 1974).

Alternatively, if the possibility of an adverse parole decision is sufficient to implicate a liberty or property interest in the instant situation, it does not follow that a transfer is invalid unless preceded by due process guarantees; it would be sufficient to simply expunge the transfer notation from the records examined by the Board of Parole. See *Fano* v. *Meachum, supra,* 520 F. 2d at 382 (CAMPBELL, J., dissenting).

In any event, Haymes indeed has several avenues by which to ascertain why he was denied parole release in 1974 and 1975. In *Haymes* v. *Regan,* 74 Civ. 4150 (S.D.N.Y.), the same plaintiff, represented by counsel, filed an amended complaint challenging, *inter alia,* the failure of the Board of Parole to give him an adequate written statement of the reasons for his parole denial.* The District Court granted relief on this claim; its order required the state to provide Haymes with a written statement of the reasons for parole denial and the facts upon which the decision was based. Pursuant to this judicial order, in September and October, 1975, Haymes received such statements with regard to his parole denials in 1974 and 1975.** It is quite clear from those statements that the denials were based on his decidedly poor disciplinary record and institutional adjustment. Haymes' difficulty adjusting to prison life was not raised in that action only. In *Haymes* v. *Preiser,* 74 Civ. 4151 (S.D.N.Y.), Haymes filed a *pro se* complaint sworn to on August 27, 1974. In that complaint he averred that between May, 1974 and the date of the complaint he had "been charged with up to as many as one hundred institutional reports (charges) to which he has been required to appear

* Effective August, 1975 the Board was required by statute to provide such a statement. N.Y. Corr. Law § 214(6), L. 1975, c. 131, § 1.

** The District Court's opinion is reported at 394 F. Supp. 711. The Court's order and the statements provided to Haymes are on file with the Clerk of this Court.

before an institutional adjustment committee . . ." (at 5).*

4. Haymes complains that defendants do not recognize the liberty interests of a prison inmate except as may be created by statute (Res. Br. at 18). Certainly the range of values which constitute the liberty interests of free persons in society (see, e.g., *Roth, supra,* 408 U.S. at 572; *Meyer* v. *Nebraska,* 262 U.S. 390, 399 [1923]) have no application to a prisoner. By virtue of his conviction, a prisoner has been deprived of most of the activities which represent liberty to non-prisoners—the right to pursue an occupation, establish a home, choose his residence, and control his living conditions. Accordingly, a prisoner's interest in the location of the prison where he resides can not be found in constitutional concepts of liberty but only in the statutes and regulations of the state. Defendants have already shown that an inmate has no legitimate claim of entitlement to placement or retention in a particular prison (Pet. Br. at 7-10). So long as his placement does not violate any constitutional mandate, such as the prohibition against cruel and unusual punishment, it is certainly accurate in the context of this case to say that an inmate has no independent liberty interest; absent some statutory entitlement to his retention at a particular prison, Haymes has no interest protected by the Fourteenth Amendment.

As Judge Campbell stated in his cogent dissent in *Fano* v. *Meachum, supra,* 520 F. 2d at 381:

> "Still, even in defining a prisoner's 'liberty' interest, one must ask not only whether a particular event may cause loss to the prisoner but whether one in the position has any claim to what was taken away.[2] Prisoners are by definition, prisoners. Changes in the condi-

* The complaint in that case is on file with this Court. Defendants' motion to dismiss is *sub judice;* Haymes is now represented by counsel.

tions of confinement, whether involving a different cell assignment, a new meal schedule, or a transfer to a new facility, seem to me to fall within the state's general right to confine, safeguard, and rehabilitate. To treat them as 'liberties' belonging to the inmate invites greater interference with the management of prisons than seems either wise or constitutionally mandated.

Where within the state penal system a prisoner is to be lodged seems to me a judgment which the state has the exclusive right to make—summarily if need be. Such decisions are part and parcel of its power to keep the prisoner safely, to protect other prisoners, and to operate its prisons. State penal institutions normally consist of more than one institution. Indeed large states may have dozens of such institutions. Administrators must decide where best to place inmates. They must consider available space and facilities and which programs are best suited to which inmates . . . [P]risoners are involuntary inhabitants and some are dangerous and unpredictable . . . I do not think the realities of the state-prisoner relationship admit to classifying such decisions, when relating to a transfer, as a liberty interest of the prisoner. Penal authorities will perhaps think it best to afford safeguards but I do not think the Constitution can reasonably be said to require them.

---

[2] A civil servant sent to Alaska, a soldier sent to Vietnam, or a prisoner sent to another institution may, in a private sense, suffer 'grievous loss', but the nature of the organization and of their role precludes acknowledging any 'liberty' or 'property' right to remain in one location. Notwithstanding language in *Morrissey* v. *Brewer*, 408 U.S. 471, 481-84 (1972), cautioning against distinctions based on 'privileges' as opposed to 'rights', it is necessary to consider not only whether what happens causes subjective loss to the individual, but whether he has a right to any protection against that loss."

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Dated: New York, New York, April 13, 1976.

Respectfully submitted,

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State of New York
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Supreme Court, U. S.
FILED
SEP 4 1975
MICHAEL RODAK, JR., CLERK

No. 74-520

In the Supreme Court of the United States

OCTOBER TERM, 1975

ERNEST L. MONTANYE, FORMER SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL., PETITIONERS

v.

RODNEY R. HAYMES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-520

ERNEST L. MONTANYE, FORMER SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL., PETITIONERS

v.

RODNEY R. HAYMES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will address the question whether the Due Process Clause requires notice and opportunity for hearing on the propriety of a disciplinary transfer of a prisoner from one prison to another.

INTEREST OF THE UNITED STATES

This case presents questions regarding the procedures prison administrators must follow when de-

ciding to move inmates from one place of incarceration to another. Although the case involves directly only the practices of prisons in a single State, the Court's decision may have a direct impact on the existing practices and procedures for management and control of inmates in all other prison systems, including the federal prison system.

In accordance with the statutory mandate to operate "an integrated system" of institutions to "assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions" (18 U.S.C. 4081), the federal Bureau of Prisons currently maintains 50 prisons of various types throughout the country. The Bureau also contracts with state or private institutions for temporary custody of prisoners and for specialized remedial programs.

In fiscal year 1975, 16,529 individuals were committed by the federal courts to the custody of the Attorney General and underwent classification study.[1] After the classification study, each prisoner was transferred to the institution deemed most appropri-

[1] This statistical information has been provided from unpublished sources by the Bureau of Prisons. Although 16,529 individuals were formally committed, a total of 17,718 individuals were received in the federal prisons from all sources, and classification reports would have been prepared for each individual received.

ate. During that year there were also approximately 15,443 other transfers from one institution to another.[2] Of these other transfers, 772 were made for "adjustment purposes," a category that includes transfers arising out of disciplinary problems; in addition, 417 inmates were transferred to more secure institutions, and in many of these cases disciplinary problems would have prompted the transfer decision.

Decisions similar to transfer decisions are made when individuals are placed in, or removed from, facilities operating under contract with the Bureau. During fiscal year 1975, 19,215 prisoners were released on furloughs (some to contract facilities), and 17,800 prisoners were received back in prison from furloughs.[3] Prisoners also are transferred within a single prison to different work and rehabilitative programs. Many of these decisions have consequences to the inmate similar to those of a transfer to another institution.

Resolution of the issues presented in this case may have a substantial impact on the procedures the Bureau must use to effect these initial assignment, classification, and transfer decisions. Although the Bureau's "disciplinary" transfers are made after compliance with the procedural guidelines of *Wolff*

[2] Some inmates were transferred more than once; even so, a substantial proportion of the total inmate population of approximately 23,500 was transferred during the year.

[3] Furloughs are unescorted travel, including home visits, court appearances, work release, study release, and release to half-way houses.

v. *McDonnell*, 418 U.S. 539, we do not concede that the Constitution requires such procedures prior to transfers. The Bureau makes other decisions without *Wolff*-type hearings, and a ruling requiring all prison transfer decisions to be made according to a particular set of rules could seriously interfere with the orderly administration of federal prisons and inhibit the continuing development and revision by the Bureau of its transfer procedures.

STATEMENT

On June 7, 1972, respondent, then an inmate of the Attica Correctional Facility, was discharged from his duties as an inmate law clerk in the prison law library. According to an affidavit filed in the district court, he was discharged because of his continuous disregard of the rules governing use of the law library.[4] Respondent promptly drew up a "petition" addressed to Judge John Curtin of the United States District Court for the Western District of New York. The petition, which respondent circulated among the other inmates for their signatures, asserted that the discharge of respondent and another inmate as law clerks was part of an attempt by the law library officer to foreclose necessary legal assistance to Attica inmates and thus deny them adequate access to the courts. By the time prison au-

[4] This statement is taken from the opinion of the court of appeals (Pet. App. 1a-12a) and from the complaint filed in the district court.

thorities seized the petition from respondent on the afternoon of June 7, he had gathered 82 signatures.[5]

On June 9, 1972, without notice or opportunity for a hearing, respondent was transferred from Attica to the Clinton Correctional Facility. Both Attica and Clinton are maximum security prisons. Respondent was not placed in closer custody in Clinton than in Attica; no notation was made in his records that would reflect adversely on his behavior or diminish his opportunities for parole. He lost neither good time nor the opportunity to earn good time.

On July 10, 1972, respondent brought this action in the United States District Court for the Western District of New York. Although brought in the form of a habeas corpus petition, the action sought neither release from prison, nor a return from Clinton to Attica, nor a hearing, but rather only compensatory and punitive money damages on account

[5] Attica Deputy Superintendent Harold Smith filed an affidavit stating that the petition had been seized because it violated a prison rule prohibiting one inmate from giving legal assistance to another inmate without obtaining permission in advance; Smith alleged that respondent had been warned on several occasions about such conduct.

Rule 21 of the Inmates' Rule Book states: "Inmates are prohibited, except upon approval of the Warden, to assist other inmates in the preparation of legal papers." As the court of appeals recognized, such rules are necessary to prevent strong-willed inmates from exacting hidden and perhaps non-monetary fees in return for legal assistance, a situation that could jeopardize prison discipline (Pet. App. 3a, 12a).

Respondent has denied that Rule 21 applied to his petition; he contends that it was, instead, personal correspondence with the courts protected by Administrative Bulletin 20 (see Pet. App. 3a).

of respondent's transfer and the confiscation of his petition to Judge Curtin. The district court treated the action as a complaint under 42 U.S.C. 1983 and, after considering affidavits and exhibits, granted summary judgment for the defendants (see Pet. App. 4a) on the grounds (Pet. App. 13a-16a) that the seizure of the petition was proper because respondent should have obtained permission to circulate it and that respondent's transfer was proper because respondent had not alleged that the facilities at Clinton were harsher or substantially different from those at Attica and, in any event, transfers are within the discretionary authority of custodians to control the place of confinement of their wards.

The court of appeals reversed. It concluded that the transfer had inflicted "real hardship" on respondent, both because of the "mere fact of dislocation" and because Clinton, although in other respects virtually identical to Attica, is farther from respondent's home. The court held that "the hardship involved * * * [is] sufficient to render [respondent's] summary transfer—if a trial establishes that it was punitive—a denial of due process" (Pet. App. 10a).[6] The court then remanded the case for trial on the question whether respondent's transfer had been intended as punishment.[7]

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[6] The court defined "punitive transfer" as any transfer "meted out to reprimand, deter, or reform" (Pet. App. 7a).

[7] The court did not attempt to explain the relationship of this holding to its earlier decision in *Newkirk* v. *Butler*, 499 F.2d 1214, vacated as moot *sub nom. Preiser* v. *Newkirk*, June 25, 1975 (No. 74-107), which would have required notice and hearing before any transfer involving "grievous loss," without regard to the motives of the prison officials ordering the transfer. Presumably implicit in the court's opinion is the understanding that the "real hardship" suffered by respondent did not amount to "grievous loss" and therefore that *Newkirk* was not directly applicable to this case; thus the decision below in effect extends the *Newkirk* hearing requirement to all "punitive" transfers. See *Jones* v. *Manson*, 393 F. Supp. 1016 (D. Conn.). But cf. *Bloeth* v. *Montanye*, 514 F.2d 1192 (C.A 2).

Nor did the court address the fact that the relief sought by respondent, money damages from the prison officials, would apparently be unavailable due to the doctrine of official immunity, regardless of the merits of respondent's constitutional claim. See *Wood* v. *Strickland*, 420 U.S. 308. See also *Cox* v. *Cook*, No. 74-751, decided March 24, 1975. However, petitioners have not pressed their defense of official immunity here.

SUMMARY OF ARGUMENT

A

The court of appeals, apparently expanding upon the decision of another panel in *Newkirk* v. *Butler*, 499 F.2d 1214 (C.A. 2), vacated as moot *sub nom. Preiser* v. *Newkirk*, June 25, 1975 (No. 74-107), held that whenever a prisoner transferred from one place of incarceration to another in order to "reprimand, deter, or reform" him has suffered "real hardship," prison administrators must provide him with notice and an opportunity for a hearing. The court's decision was based upon the Due Process Clause of the Fourteenth Amendment. But that Clause applies only in those circumstances in which governmental action deprives an individual of "liberty" or "property." Thus an evaluation of respondent's claim must begin with an inquiry the court of appeals over-

looked—whether respondent has a liberty or property interest in remaining in any particular prison.

Removing a prisoner from a prison into which he has been placed does not deprive him of liberty. He was deprived of his liberty upon conviction, sentence, and incarceration. The very fact of his conviction for a crime, and the legitimate placement of his person into the hands of a custodian who will be responsible for his safekeeping and the supervision of the most intimate details of his life, extinguishes any liberty interest he may possess in selecting his place of residence. The prisoner therefore is not deprived of his liberty by being moved from one prison to another.

The Constitution does not create a liberty interest in being free of the potentially less advantageous circumstances of a different prison, even if the difference amounts to "grievous loss." The conviction and authorized incarceration of any person entitles his custodian to expose him to at least that range of custodial conditions reasonably anticipated by the judge pronouncing the sentence, so long as those conditions do not independently violate the Eighth Amendment. While we do not suggest that it is desirable that transfer decisions be made arbitrarily or on the basis of mistaken factual assumptions, subjection of prisoners to custodial decisions that may not be fully responsive to their situation, while unpleasant, is not barbaric or uncivilized. The risk of occasional subjection to arbitrariness or mistake is to some extent inherent in the custodial relationship,

and the existence of that inherent risk does not create in the prisoner a liberty interest to be free of it.

Certainly a prisoner has an "interest" in remaining in a prison the conditions of which he prefers to those of some alternative prison. But that interest is not constitutionally cognizable as a "liberty" interest. The loose constellation of constitutionally based values that underlies the analysis of claims of "liberty" does not pertain to the day-to-day living conditions of persons lawfully confined. A prisoner's interests relating to the identity or physical location of his place of confinement are founded not on constitutional concepts of liberty but on the statutes, regulations, and rules that govern the terms and conditions of his confinement. His interests are no more expansive than those established by such statutes, regulations, and rules, and are more closely related to "property" than to "liberty."

This Court's decisions make clear that a legitimate claim of entitlement under a statute, regulation, or rule warranting the procedural protections of due process exists only when the State has bound itself to take, or refrain from taking, specified actions on the basis of determinable facts. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

It is likewise clear that a legitimate claim of entitlement arises only from positive law and not from the individual's unilateral expectations.

Under New York (and federal) law, the decision where to confine a prisoner is completely discretionary. No set of facts respondent could prove or attempt to prove would entitle him to remain in an institution where he had temporarily been placed. Even if a prisoner were able to prove, in connection with a proposed disciplinary transfer, that he was innocent of any infraction of the prison's rules, prison officials still would retain discretionary authority to effect the transfer. Because decisions concerning institutional placement are not governed by any particular controvertible facts but instead are discretionary, respondent could under no circumstances have a legitimate claim of entitlement either to remain in one prison or to be moved to another. Accordingly, respondent has no constitutionally protected liberty or property interest in the place of his confinement. Respondent's only "interest" is a hope or expectation to be confined in whatever prison he deems most advantageous to himself. But the Constitution does not require that any particular procedures be used before a State acts to disappoint an individual's unilateral expectations.

Nor does any constitutionally protected interest arise from the mere fact that a prisoner's transfer may be motivated by disciplinary considerations. Where "punishment" does not amount to a deprivation of constitutionally protected liberty or property,

the procedural protections of due process are not implicated.

B

Even when a prisoner has been deprived of a liberty or property interest, it is necessary to examine all interests at stake in order to determine how much "process" is due. We submit that even if a prisoner's transfer from one place of incarceration to another did implicate his liberty or property, the Court should hold that procedures less formal than notice and opportunity for personal hearing are adequate to accommodate the legitimate interests of the prisoner and the competing interests of prison administration.

If it were reasonably feasible to distinguish between a disciplinary transfer and a nondisciplinary or administrative transfer, it might be appropriate to strike the constitutional balance by providing the same procedural protections that are currently provided in connection with punitive sanctions such as loss of good time. See *Wolff* v. *McDonnell*, 418 U.S. 539. But disciplinary and administrative "reasons" are inextricably intertwined in most transfer decisions; a conscientious prison administrator, seeking to place a prisoner in the institution most likely to provide a satisfactory mixture of confinement, punishment, and rehabilitative opportunities, will of course consider the prisoner's record of behavior and compliance with prison rules. A distinction between disciplinary and administrative transfers therefore would be difficult to draw in practice, and even more difficult for the judiciary to administer on a case-by-

case, *post hac* basis, for in almost every prisoner's record there will be some incident upon which he could base a colorable claim that the transfer was intended to "reprimand, deter, or reform" him. In short order, prison officials could well be compelled to adopt uniform and elaborate procedures for all transfers in order to minimize disputes and litigation and preserve a semblance of order in decision-making. That result would, we believe, be most unfortunate, for there are compelling reasons, applicable to both administrative and disciplinary transfers, for allowing such decisions to be made informally.

The range of reasons for which an inmate may be transferred is quite broad. These include the initial classification decision to transfer an inmate to an institution apparently most suitable for the inmate; placement in an institution nearer the offender's release point; placement in an institution more appropriate to the length of time remaining to be served; placement in an institution containing more appropriate training or medical facilities; removal from an institution to which adjustment has been poor; transfers to reduce excessive population or increase deficient population; and removal for the safety of the transferred inmate or other inmates. Many of these causes for transfer do not turn upon objective inmate-specific facts of the sort most appropriate to trial-type determination. Some of them require only the determination of "legislative" facts about which the inmate could offer little of importance at such a

hearing. Others may offer appropriate occasions for entertaining the inmate's views, but these may be obtained without a formal adversarial hearing in every case. Other transfers are made because of suspicions that are incapable of objective proof in the particular case but nevertheless justify action.

Of course, even in many of the foregoing categories, inmate-specific facts may to some extent be relevant to the transfer decision, and hearings might on occasion operate to prevent a transfer prompted in part by a mistaken view as to those facts. But it is the judgment of prison authorities that the institutional costs of providing procedures to reduce the risks of mistakes of this sort outweigh the benefits to be derived from such procedures.

Provision of a trial-type hearing on every transfer occasion does not necessarily increase the welfare of prisoners as a group. It has been contended with some cogency that converting the relationship between the inmate and his custodian into a formally "adversarial" one may interfere with the rehabilitative goal of these institutions and make prison life more acrimonious than is otherwise necessary. Notice of the transfer may increase the possibility that inmates, disappointed by the prospect and despairing of their ability to prevent it, may act violently toward their custodians or other inmates.

What is more, to the extent a hearing will operate to keep within a particular prison one who otherwise would leave, it also will keep out of the presumably "more desirable" institution one who otherwise would

gain entry: one inmate's gain is another's loss. Finally, even when a specific disciplinary infraction is alleged, the hearing could not usefully explore the wisdom of making a transfer decision, for administrators retain discretion to transfer despite the lack of transgression. Accordingly, we submit, the Due Process Clause should not be held to require notice and opportunity for a hearing when prison administrators do no more than allocate their charges to whatever prison, and for whatever reason, the administrators deem best for the prisoner and the prison system.

ARGUMENT

THE DUE PROCESS CLAUSE DOES NOT REQUIRE NOTICE AND OPPORTUNITY FOR HEARING ON THE PROPRIETY OF A DISCIPLINARY TRANSFER OF A PRISONER FROM ONE PRISON TO ANOTHER

A. A Prisoner Has No Constitutionally Protected Interest In Remaining In A Prison In Which He Has Been Temporarily Placed

1. *The Procedural Protections of the Due Process Clause Apply Only to Proceedings That May Result in the Deprivation of an Individual's "Liberty" or "Property"*

The procedural protections of the Due Process Clause do not extend generally to all situations in which governmental action or inaction may be adverse to the interests of a particular individual or group. By its terms, that Clause applies only in those circumstances where governmental action threatens to deprive an individual of "liberty" or

"property."[8] Accordingly, this Court, in evaluating claims of entitlement to the procedural protections of due process, has been scrupulously careful to identify the nature of the particular substantive interests at stake.

Perhaps the paradigm is *Board of Regents* v. *Roth*, 408 U.S. 564. Roth had been hired for an academic year by Wisconsin State University; the University declined to renew his contract and Roth brought suit, claiming that he was entitled to notice of charges and a hearing on the nonrenewal. The Court agreed with Roth that he possessed a substantial "interest" in continued employment, but that fact, the Court held, was not determinative of the due process question (408 U.S. at 570-571; emphasis in original):

> [T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. * * * We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

The Court then determined that Roth's interest in continued employment, *i.e.*, his desire to obtain a renewal of his contract, was neither a "liberty" nor a "property" interest, and therefore that he could be deprived of that interest without due process.

The *Roth* decision illustrates that the substantiality

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[8] We need not here discuss the special situation in which the governmental action threatens to deprive the individual of his life.

of an interest is not determinative of whether that interest is entitled to due process protection. Thus the fact that a prisoner's "interest" in avoiding disciplinary transfer to another prison in some circumstances may be substantial cannot be dispositive of the due process claim in this case. To the contrary, as *Roth* further demonstrates, the evaluation of any due process claim must begin with an inquiry into whether the interest of which the individual may be deprived is a constitutionally cognizable liberty or property interest. See also *Arnett* v. *Kennedy*, 416 U.S. 134. It is to that inquiry that we now turn.

2. *Except To The Extent That He May Have A Legitimate Claim Of Entitlement Grounded In The Statutes, Regulations, Or Rules Governing The Conditions Of His Confinement, A Prisoner Has No Constitutionally Cognizable Interest In Avoiding Disciplinary Transfer To Another Prison*

a. *A prisoner has no "liberty" interest in remaining in any particular prison*

A defendant who has been convicted of a crime, sentenced to imprisonment, and confined pursuant to that sentence has, in a very basic sense, lost his "liberty" for the period of his sentence: the sentence of imprisonment lawfully places him under the physical control of the State for the period prescribed. The sentence of imprisonment places the prisoner in the hands of those who will be his custodians for the purposes of punishing him for his crime, detaining him so that he cannot harm others, and, if possible, rehabilitating him so that when he is released he will not resume the conduct that

led to his incarceration. *Pell* v. *Procunier*, 417 U.S. 817, 822-823. Cf. Packer, *The Limits of the Criminal Sanction* 35-70 (1968). All this is a necessary concomitant of incarceration. "Stated simply a man in jail is not a free man; the denial of his right to drink fully from the cup of freedom is the very hypostasis of confinement." *Gittlemacher* v. *Prasse*, 428 F.2d 1, 3 (C.A. 3). Cf. *Jackson* v. *Godwin*, 400 F.2d 529, 532 (C.A. 5).[9]

"Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U.S. 266, 285. This is not necessarily to say that a prisoner retains no constitutionally cognizable liberty interest at all. Cf. *Procunier* v. *Martinez*, 416 U.S. 396. See generally *Wolff* v. *McDonnell*, 418 U.S. 539, 555-556. We do contend, however, that a prisoner has no constitutionally cognizable "liberty" interest in remaining in any particular prison. The mere identity or physical location of a prisoner's place of confinement is not a matter of constitutional significance: a prisoner's liberty is not affected in a constitutionally significant manner by his transfer from one institution to another, especially where, as

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[9] This Court has stated that the liberty interest as defined by the Fourteenth Amendment is that liberty "essential to the orderly pursuit of happiness by free men." *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 157 (plurality opinion of Mr. Justice Rehnquist); *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 572; *Meyer* v. *Nebraska*, 262 U.S. 390, 399. But a prisoner by definition is not a free man.

here, that transfer is unaccompanied by any adverse alteration in the conditions of confinement.

Certainly a prisoner has no relevant "liberty" interest against transfer deriving from the Eighth Amendment's prohibition against cruel and unusual punishments. This is true even when the transfer is to a more secure institution: a prisoner has no constitutionally protected right to be subjected only to the minimum restraints necessary to confine and rehabilitate him. Since confinement is, after all, a form of punishment, it legitimately may be made uncomfortable both to punish the offender and to deter others from committing similar crimes. See, *e.g.*, *Pell* v. *Procunier*, *supra*; *United States* v. *Foss*, 501 F.2d 522 (C.A. 1). See also *Williams* v. *New York*, 337 U.S. 241, 248; *Powell* v. *Texas*, 392 U.S. 514, 530 (plurality of opinion of Mr. Justice Marshall). See generally Zimring & Hawkins, *Deterrence* (1973).

The severity of the punishment is determined by a combination of factors, foremost among which are the length of the incarceration and the quality of the conditions of confinement. The sentencing tribunal is presently free to select, without restraint other than statutory maxima, the length-of-incarceration component. *Dorszynski* v. *United States*, 418 U.S. 424. It would make little sense, given the sentencing court's ability to control the length of incarceration, for this Court to hold that the conditions of confinement cannot be more severe than those "minimally" necessary to restrain or rehabilitate the prisoner.

In any event, social science research has not yet progressed to the point where we can say with any confidence what is the "minimum" restraint necessarily imposed on an individual. The inmate's reactions to his confinement, his future "dangerousness," and the optimum conditions for his rehabilitation are all so speculative that it would be practically impossible to supervise a "minimum restraints" rule. The courts would be compelling prison officials to attempt the impossible, and the result would be both meaningless and unenforceable.[10] Since we conclude that a prisoner has no liberty interest in avoiding transfer to a more secure institution, *a fortiori*, a transfer like that in question here, from one maximum security prison to another, does not deprive a prisoner of constitutionally protected liberty.

This Court's decision in *Wolff* v. *McDonnell*, *supra*, is not to the contrary. The question in *Wolff* was whether the protections of due process extend to prison disciplinary proceedings that may result in the reduction of a prisoner's statutory good-time credits. This Court held that the protections of due process do apply to such proceedings. But the Court's decision did not turn upon the mere fact that a reduction in good-time credits might affect the timing of the prisoner's release, *i.e.*, it did not turn upon a simple identification of release from prison with constitutionally protected liberty. Instead, the Court

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[10] Cf. Note, *Guilt by Physiology: The Constitutionality of Tests to Determine Predisposition to Violent Behavior*, 48 S. Cal. L. Rev. 489 (1974).

focused narrowly on the nature and source of the prisoner's interest in the retention of his accumulated good-time credits. Since that interest was created by statute, and by statute could be extinguished only "[i]n cases of flagrant or serious misconduct" (418 U.S. at 546), the Court concluded that "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated" (418 U.S. at 557).

This approach, which would appear necessarily applicable here as well, avoids reference to or reliance upon the loose constellation of constitutionally based values that underlie the analysis of claims of "liberty" interests in non-prisoner cases. See, *e.g.*, *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 572; *Meyer* v. *Nebraska*, *supra*, 262 U.S. at 399. The Court's analysis in *Wolff* implicitly recognizes that such values do not, in the main, pertain to persons lawfully confined. A prisoner's interests relating to release, as in *Wolff*, or to the identity or physical location of his place of confinement, as here, are founded not in constitutional concepts of liberty but in the statutes, regulations, and rules that govern the terms and conditions of his confinement. In other words, a prisoner has no constitutionally protected interest in remaining in a particular prison, except

to the extent that those statutes, regulations, and rules create such an interest.

Accordingly, any interest that a prisoner may have in remaining in a particular prison is in fact nothing more than a "property" interest, *i.e.*, an entitlement created by nonconstitutional sources of positive law. Our position here, therefore, is that, whatever the scope of Fourteenth Amendment "liberty" interests in other contexts, a prisoner's interest relating to the identity or physical location of his place of confinement, to be constitutionally entitled to the procedural protections of due process, must satisfy the tests used by this Court for determining the existence of a constitutionally cognizable "property" interest.

b. ***To be constitutionally cognizable, a prisoner's "property" interest in remaining in any particular prison must be grounded in the statutes, regulations, or rules governing the conditions of his confinement***

This Court's recent decisions involving the assertion of property interests make clear that a constitutionally cognizable property interest arises only when the condition limiting the Executive's freedom of action exists in positive law and not merely in the hopes or expectations of the individual. This Court in *Roth* explicitly rejected the argument that such a property interest could arise merely from the individual's need, desire, or expectation (408 U.S. at 577):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or

> desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

A legitimate claim of entitlement exists only when the state has bound itself, either by statute, regulation, rule, or well-settled course of practice, to take, or refrain from taking, specified actions on the basis of determinable facts. So, for example, in *Goss* v. *Lopez*, 419 U.S. 565, the student had a statutory right to attend school unless he was guilty of misconduct; in *Arnett* v. *Kennedy*, *supra*, the employee could be terminated only for cause; in *Perry* v. *Sindermann*, 408 U.S. 593, the teacher asserted a well-settled practice of reemployment absent "sufficient cause." See also *Goldberg* v. *Kelly*, 397 U.S. 254. Where the State has bound itself to extend or confer a benefit, or withhold a sanction, upon the determination of a particular set of facts, the Due Process Clause requires the implementation of procedures designed to ensure that the determination of those facts will be made fairly and accurately. Cf. *Richardson* v. *Perales*, 402 U.S. 389, 401-402.

On the other hand, where the State has not so bound itself, there can be no legitimate claim of entitlement. In *Roth*, for example, the university had discretion not to reemploy the teacher, and no set of facts he could prove would entitle him to reemployment. See also *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886. When there is no determinable set of facts that could give rise to an entitlement, the process of determining the facts cannot result in the deprivation of any entitlement; in such circumstances, the procedural protections of due process are not implicated. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

Thus a prisoner, to establish that he has a legitimate claim of entitlement to remain in a particular prison, must point to some statute, regulation, or rule that limits or conditions in some way the State's authority to decide where its prisoners will be confined.

> c. *The fact that a prisoner's transfer may be motivated by disciplinary considerations has no independent constitutional significance*

In our view, the constitutional analysis outlined above is not affected by the particular considerations that may have influenced the State's decision to transfer the prisoner. The fact that a prisoner's transfer may be motivated by disciplinary considerations has no independent constitutional significance.[11] This is

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[11] The court of appeals incorrectly referred to transfers effected because of disciplinary infractions as "punitive." At least in the federal prison system, transfers are not made for punitive purposes. But disciplinary infractions may indicate that an inmate is confined in an improper place and should be transferred to a different prison; for example, transfers to more secure prisons are often effected following the prisoner's attempt to escape from a minimum security prison. Such

not to say that motivation is necessarily wholly irrelevant. If, for example, the regulatory scheme granted a prisoner the right to remain in a particular prison *absent misconduct*, then the prisoner would have a legitimate claim of entitlement: he would be constitutionally entitled to procedural protections that would ensure a fair and rational determination of whether he was guilty of misconduct before he could be transferred. A similar result might follow if the regulatory scheme provided that no disciplinary sanctions of any kind could be imposed without a prior hearing. But the constitutional analysis in each of those circumstances would in essence be the same as that already described: the existence of the prisoner's protected interest turns upon whether some statute, regulation, or rule limits or conditions the State's authority, as custodian, to determine where its prisoners will be confined.

The court of appeals, however, eschewing any conventional analysis of liberty or property rights, laid it down as a maxim that "elementary fairness demands that the one punished be given a satisfactory opportunity to establish that he is not deserving of such handling" (Pet. App. 7a). That statement by the court has a superficial ring of plausibility only because the concept of "punishment" is so closely identified with the deprivation of liberty or property.

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transfers are justified by penological considerations and are not punitive. This essential feature of disciplinary transfers distinguishes them from disciplinary punishments, such as loss of good time.

But where the "punishment" does not amount to a deprivation of constitutionally protected liberty or property, the procedural protections of due process are not implicated. If the individual's liberty or property interests are not affected, the state's motivation, unless invidious or prohibited (*e.g.*, to effect unlawful racial segregation), is constitutionally irrelevant.[12]

In short, unilateral disciplinary decisionmaking by prison officials does not constitute a denial of due process. In so saying, we are aware that unilateral decisions entail some risk of error. But there is no liberty or property interest in diminishing error in decisions not involving liberty or property. Any other result would be mere constitutional bootstrapping, *i.e.*, more elaborate procedures would be required as to governmental decisionmaking merely because less elaborate procedures entail greater risk of error. But an individual has no constitutional interest in more elaborate procedures as such; the Constitution requires such procedures only where they serve the purpose of protecting some substantive liberty or property interest.

Furthermore, to a considerable extent, subjection to unilateral decisionmaking is a necessary result of

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[12] As the court held in *Roth*, the State's reason for refusing to renew the teacher's contract was irrelevant unless the reason was "prohibited," as would be the case if the reason had to do with punishment for the exercise of constitutionally protected rights. But in that event the official action itself would be improper, whether or not a hearing had been provided.

committing an individual to a custodian who will control the most minute details of his daily life. Realistically, the potential for error, even under the most comprehensive procedures, can be eliminated only by eliminating the custodial control. Moreover, it has been theorized that such a regimen—subjection to potentially authoritarian control that will increase the individual's responsiveness to social rules—may be an important part of rehabilitation. See, *e.g.*, Glaser, *The Effectiveness of a Prison and Parole System* 122-123 (1969); Ohlin, *Modification of the Criminal Value System*, in *The Sociology of Punishment and Correction* 179 (Johnston, Savitz & Wolfgang ed. 1962). But see Note, *Bargaining in Correctional Institutions: Restructuring the Relation between the Inmate and the Prison Authority*, 81 Yale L. J. 726 (1972).

Accordingly, we conclude that the procedural protections of due process do not attach to the transfer decision, whether or not that decision is motivated by disciplinary considerations, unless the prisoner can assert a legitimate claim of entitlement, grounded in the statutes, regulations, or rules governing the conditions of his confinement, to remain in the prison where he has been placed. We now turn to the question whether such a claim of entitlement has been established here.

3. *Respondent Has No Legitimate Claim Of Entitlement To Remain In A Particular Prison*

As we have explained above, a legitimate claim of entitlement exists only where the State has bound

itself to take or refrain from taking specified actions on the basis of determinable facts. But once an individual has been confined, no fact or set of facts entitles him to be incarcerated in a particular institution. The State, acting as custodian, may send the prisoner to any institution that, in its discretionary judgment, will advance the purposes for which the inmate has been imprisoned and the needs of the penal system—subject, of course, to any statutes or regulations that control the exercise of that discretion. Unless such statutes or regulations establish legitimate claims of entitlement, an inmate cannot assert an interest in control over the place of his residence, because it was *exactly* that claim that the judgment of conviction stripped from him. The governing federal statutes, 18 U.S.C. 4081 and 4082(b), expressly grant federal prison officials full discretion over the placement and transfer of prisoners. See *Moore* v. *United States Attorney General*, 473 F.2d 1375 (C.A. 5); *Holland* v. *Ciccone*, 386 F.2d 825 (C.A. 8), certiorari denied, 390 U.S. 1045.[13] Thus, not only is there no positive source in statute, regulation, or common law for a legitimate claim of entitlement in this connection, but Congress has specifically declared that, for federal prisoners, transfers

[13] Some statutes of narrow application, such as the Narcotic Addict Rehabilitation Act, 18 U.S.C. 4251-4255, create a legitimate claim of entitlement enforceable, in most circumstances, by the inmate. But 18 U.S.C. 4081 and 4082(b) vest federal prison officials with full discretion concerning an ordinary inmate's place of confinement.

shall *not* be conditioned upon any particular state of facts. The situation in New York appears to be the same. See N.Y. Correction Law § 23 (McKinney Supp. 1974). Even if a prisoner were able to prove, in connection with a proposed disciplinary transfer, that he was innocent of any disciplinary infraction, prison officials still would retain discretionary authority to effect the transfer.

Because no set of facts entitles a prisoner to placement in any particular institution, he does not acquire a legitimate claim of entitlement to remain there.[14] His desire to do so is simply a "unilateral expectation" (*Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577), for which the Due Process Clause provides no procedural protection. The prisoner acquires no claim of entitlement to continuation of the *status quo* unless that claim has been established by rule or statute. Here, the sole source of the expectation of continuity of his current confinement is the prisoner himself; there is no such statute or rule. An inmate can be moved to another institution no matter how well he has behaved in the first. Because of this discretion, there is no legitimate claim of entitlement with regard to institutional residence. As Judge Campbell recognized in his cogent dissent in *Fano* v. *Meachum*, C.A. 1, No. 74-1033, decided June 27, 1975, slip op. 11-12:

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[14] Cf. *Sims* v. *Fox*, 505 F.2d 857 (C.A. 5) (*en banc*) (dismissal from the Air Force as punishment requires no hearings because Air Force membership is neither liberty nor property).

> [E]ven in defining a prisoner's "liberty" interest, one must ask not only whether a particular event may cause loss to the prisoner but whether one in his position has any claim to what was taken away.[2]

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[2] A civil servant sent to Alaska, a soldier sent to Vietnam, or a prisoner sent to another institution may, in a private sense, suffer "grievous loss", but the nature of the organization and of their role precludes acknowledging any "liberty" or "property" right to remain in one location. Notwithstanding language in *Morrissey* v. *Brewer*, 408 U.S. 471, 481-84 (1972), cautioning against distinctions based on "privileges" as opposed to "rights", it is necessary to consider not only whether what happens causes subjective loss to the individual, but whether he has a right to protection against that loss.

> Prisoners are, by definition, prisoners. Changes in the conditions of confinement, whether involving a different cell assignment, a new meal schedule, or transfer to a new facility, seem to me to fall within the state's general right to confine, safeguard, and rehabilitate.
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> As prisoners are involuntary inhabitants and some are dangerous and unpredictable, administrators must decide whether a given inmate is more likely to escape from one place than another, and whether the mere presence of an inmate in a given setting is likely to be volatile and more dangerous. Such judgments may often

be little more than educated guesses based on suspicions. They may involve predictions of future dangerousness which in turn echo assumptions as to the inmate's role in past disturbances. While I can understand the argument that no adverse assumptions should ever be made without minimal due process—hearing, confrontation of witnesses, and the like—I do not think the realities of the state-prisoner relationship admit to classifying such decisions, when relating to a transfer, as a liberty interest of the prisoner. Penal authorities will perhaps think it best to afford safeguards, but I do not think the Constitution can reasonably be said to require them.

B. Even if A Prisoner Has A Liberty Or Property Interest In Avoiding Disciplinary Transfer, He Is Not Entitled To Prior Notice And Opportunity For Hearing On The Propriety Of The Transfer

If this Court concludes, contrary to the arguments set forth above, that a prisoner has a legitimate claim of entitlement to remain in a particular prison, it must then consider what process is "due" in connection with the transfer decision. In doing so, it is necessary to balance the interests of the inmate against the countervailing interests of the penological system. *Morrissey* v. *Brewer*, 408 U.S. 471, 481; *Wolff* v. *McDonnell supra*. See generally Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267 (1975). The court of appeals failed to undertake this balancing and consequently erred by requiring inflexible notice and hearing procedures regardless

of the quantum of loss to the inmate in particular cases and the goals and needs of the prison system.[15]

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[15] Federal courts that have considered the requirements of prison transfers generally have failed adequately to balance the countervailing interests. Perhaps the leading authority is *Gomes* v. *Travisono*, 490 F.2d 1209 (C.A. 1), vacated and remanded, 418 U.S. 909, modified and affirmed on remand, 510 F.2d 537. *Gomes* initially required some procedural safeguards in all transfers but differentiated between disciplinary transfers (which received procedures substantially similar to those later approved in *Wolff*) and administrative transfers, which it held required only advance notice and an informal opportunity to respond. On remand, however, the court held that under *Wolff* the purpose and motive for the transfer should be irrelevant because all transfers imposed burdens on inmates and administrators unrelated to the transfer's purpose. See *Fano* v. *Meachum*, *supra*. We submit that *Gomes* both misapprehended *Wolff* and is factually incorrect with respect to the burdens imposed on inmates and administrators.

Other courts have imposed *Wolff*-type procedures only in cases of disciplinary transfer. See, *e.g.*, *Ault* v. *Holmes*, 506 F.2d 288 (C.A. 6), affirming in part and vacating in part 369 F. Supp. 288 (W.D. Ky.); *Stone* v. *Egeler*, 506 F.2d 287 (C.A. 6), modifying and affirming 377 F. Supp. 115 (W.D. Mich.); *Aikens* v. *Lash*, 514 F.2d 55 (C.A. 7); *Fajeriak* v. *McGinnis*, 493 F.2d 468 (C.A. 9) (by implication, holds that routine administrative transfers may be made without hearing); *Bryant* v. *Hardy*, 488 F.2d 72 (C.A. 4) (by implication, holds that need for hearing depends on reasons for and consequences of transfer).

Several district courts have required adversarial hearings for all transfers, regardless of the reason they are carried out. *King* v. *Higgins*, 370 F. Supp. 1023 (D. Mass.) (by implication); *Hoitt* v. *Vitek*, 361 F. Supp. 1238 (D. N.H.); *Kessler* v. *Cupp*, 372 F Supp. 76 (D. Ore.); *Capitan* v. *Cupp*, 356 F. Supp. 302 (D. Ore.); *Robbins* v. *Kleindienst*, 383 F. Supp. 239 (D.D.C.) (dismissed by stipulation, November 27, 1974); *Jones* v. *Manson*, 393 F. Supp. 1016 (D. Conn.). The rationale for all of these cases is that the quantum of "grievous loss"

The court of appeals would require notice and opportunity for hearing in connection with all "punitive" transfers, but it did not elaborate upon the standards to be used for determining whether a particular transfer is or is not "punitive." If, by

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suffered by the inmate does not depend upon the reason for the transfer.

On the other hand, several district courts have held that an adversarial hearing is required only when a transfer is effected for disciplinary reasons. *Walker* v. *Hughes*, 375 F. Supp. 708 (E.D. Mich.) (court will look to "true" reason for transfer); *Beatham* v. *Manson*, 369 F. Supp. 783 (D. Conn.); *Croom* v. *Manson*, 367 F. Supp. 586 (D. Conn). Cf. *Schumate* v. *People of State of New York*, 373 F. Supp. 1166 (S.D. N.Y.) (hearings required only when there is a substantial change in quality of confinement).

Finally, a number of courts have held that hearings are never a prerequisite to the transfer of an inmate. *United States ex rel. Arzonica* v. *Scheipe*, 474 F.2d 720, 721 (C.A. 3); *Gray* v. *Creamer*, 465 F.2d 179, 187 (C.A. 3) ("a state prisoner has no constitutional right to remain in any particular prison" and, therefore, no right to procedural protection); *Urbano* v. *McCorkle*, 334 F. Supp. 161 (D. N.J.), affirmed, 481 F.2d 1400 (C.A. 3); *Hillen* v. *Director*, 455 F.2d 510 (C.A. 9); *Benfield* v. *Bounds*, 363 F. Supp. 160 (E.D. N.C.); *Bundy* v. *Cannon*, 328 F. Supp. 165, 173 (D. Md.). Similarly, courts have held that the initial placement and transfer as part of the classification process are within the discretion of the Attorney General and that no hearings are required. *Rodriguez-Sandoval* v. *United States*, 409 F.2d 529 (C.A. 1); *Van Sirrs* v. *Ciccone*, 437 F.2d 884 (C.A. 8) (initial placement decision not reviewable even for abuse of discretion); *Lawrence* v. *Willingham*, 373 F.2d 731 (C.A. 10); *Rees* v. *Peyton*, 341 F.2d 859 (C.A. 4); *Hogue* v. *United States*, 287 F.2d 99 (C.A. 5), certiorari denied, 368 U.S. 932; *Rayborn* v. *Swope*, 215 F.2d 604 (C.A. 9); *Dominguez* v. *Moseley*, 317 F. Supp. 10 (D. Kan.), affirmed, 431 F.2d 1376 (C.A. 10); *Muniz* v. *United States*, 280 F. Supp. 542 (S.D. N.Y.).

"punitive" transfer, the court means a transfer based explicitly upon an identified disciplinary infraction, our disagreement with the requirement of notice and hearing (once it is assumed that constitutionally protected interests are involved) is slight: where a transfer decision is to be based explicitly upon an identified disciplinary infraction, it may be better practice to afford the prisoner an opportunity for a hearing, as the federal Bureau of Prisons now does, limited, however, to the question whether the infraction actually occurred (cf. *Wolff* v. *McDonnell*, *supra*); for reasons we discuss further below, the scope of such a hearing should not extend to the propriety of the proposed transfer itself.

But if, as seems more likely in view of the fact that the court identified as "punitive" any transfer "meted out to reprimand, deter, or reform" an inmate (Pet. App. 7a), it requires hearings for any transfer based primarily upon an inmate's history or prospects, our disagreement is substantial and pervasive.

If it were reasonably feasible to distinguish clearly between a "disciplinary" transfer and a nondisciplinary or "administrative" transfer, it might be appropriate, assuming that there were a liberty or property interest at stake, to strike the constitutional balance in favor of providing the same procedural protections provided in connection with other disciplinary sanctions under *Wolff* v. *McDonnell*, *supra*. But in most jurisdictions—and these must include all or nearly all of the states, and the federal prison system as well—the nature of any

given transfer decision might often not be readily classifiable. The decision by prison officials to transfer a prisoner from one prison to another is, in most instances, the product of inextricably intermixed disciplinary and administrative considerations. A conscientious prison administrator, who sought to make placement decisions solely on the basis of judgments concerning penological efficacy and with no intention of meting out "punishment," would nevertheless be required to give full consideration to an inmate's record of behavior and compliance with the prison's rules. The distinction between disciplinary and administrative transfers therefore is not easily articulated or applied in practice. Transfers are quite different from the discipline involved in *Wolff*, where the sanction—loss of good time—was clearly punitive and could be imposed only as punishment for particular infractions of the institution's rules.

It seems likely that in most prisoners' backgrounds there is some history of prison misconduct. Thus, any such prisoner, upon transfer, would have some basis to claim that his transfer was disciplinary. If different procedural protections attached according to an assessment of the "ultimate" reason for the transfer, courts would be required upon complaint to make the difficult factual determination whether, in hindsight, the transfer appeared to have been based principally upon disciplinary considerations.[16] The case-

[16] If a transfer was found to be disciplinary, presumably the court would be required to order the prisoner returned to the first prison; a hearing would then follow to determine whether retransfer would be appropriate; and that determination presumably would be subject to review, at least to the extent necessary to ensure that the proper procedures had been employed.

by-case adjudication of transfer complaints under such a scheme might impose an intolerable burden upon the federal courts and would have foreseeable ill effects upon the efficient operation of federal and state prison systems. In such circumstances, prison officials could well be forced to adopt more elaborate procedures for all transfers, in order to minimize disputes and litigation.

Such a result would, we believe, be most unfortunate. The arguments against requiring notice and hearing in connection with transfers are compelling. Many of those arguments apply with equal force to disciplinary and administrative transfers; in the discussion below we elaborate upon the reasons why the propriety of the transfer itself should not be subject to judicial review even when it is intended to serve disciplinary purposes. Procedures less elaborate than notice and opportunity for a personal hearing can accommodate the relevant countervailing interests. We believe this to be true without distinction between transfers involving "grievous loss" and those entailing only "real hardship." See note 7, *supra*. Thus, if this Court concurs in our arguments here, it would be appropriate for the Court not only to reverse the judgment below but also expressly to disapprove the court of appeals' earlier decision in *Newkirk* v. *Butler*, *supra*.

1. *The Current Practices Of The Bureau Of Prisons Provide Flexible But Adequate Accommodation of The Interests Of Prisoners And the Prison System*

As we have discussed at some length in our brief as *amicus curiae* in *Baxter* v. *Palmigiano*, No. 74-1187, and *Enomoto* v. *Clutchette*, No. 74-1194,[17] prisons are closed societies of proven lawbreakers under the constant supervision and control of a limited staff. Widespread hostility, frustration, and inevitable disenchantment on the part of the inmates with their predicament make the atmosphere frequently tense and hostile. Cf. *Wolff* v. *McDonnell*, *supra*. Prison authorities believe that testimonial confrontations between an inmate and staff members or other inmates can exacerbate these tensions and therefore are normally to be avoided, even at the cost of an increased possibility of error in decisionmaking, with the disappointment and frustration such error can generate. To a great extent, the development of procedures governing transfer, classification and discipline of inmates has been a process of accommodating the desire for the increased accuracy hearings can produce with the need for substantial flexibility in meeting volatile conditions and the need for minimizing both the administrative inconvenience and the potential for strife inherent in any hearing procedure. We believe that the current rules and procedures of the federal Bureau of Prisons are a

[17] We are furnishing copies of that brief to counsel for the parties.

reasoned and reasonable accommodation of conflicting interests, developed by authorities who bear the heavy burden of maintaining order and providing for rehabilitation in a closed society of a typically disorderly people.

a. Prior to 1930 a federal prisoner automatically was incarcerated in a state prison in the district in which he or she was convicted. See 1873-1874 Rev. Stat. 5540, 5541, 5542, 5546; S. Rep. No. 533, 71st Cong., 2d Sess. (1930). When the Bureau of Prisons was created in 1930, Section 7 of the Act of May 27, 1930, 46 Stat. 390 (as amended, 18 U.S.C. 4081), required the Bureau to create and maintain a diversified system of institutions to meet the variety of needs encountered in a diverse group of inmates. Sentencing judges were given authority to determine the "type" of institution in which a convict should be incarcerated. After the judge had selected the type of institution, the Attorney General was authorized to choose a specific prison and thereafter to transfer the prisoner in his discretion in order to alleviate overcrowding or attain other penological objectives. Section 7 of the Act of May 14, 1930, 46 Stat. 326 (as amended, 18 U.S.C. 4082). This plan proved too inflexible to meet the administrative and rehabilitative needs of the federal prison system. Often courts designated a type of institution not equipped to furnish appropriate custody, discipline, care and treatment. In order to ameliorate this problem, an individual was assigned initially to an institution of the type designated by the court and then

immedately removed to a more appropriate place of custody.

In 1941 Attorney General Jackson proposed to Congress that the Attorney General be given full discretion to designate and change the place of custody. His letter explained that such administrative discretion was important in order to ensure that inmates would be placed in institutions most conducive to their safekeeping and rehabilitation. See S. Rep. No. 369, 77th Cong., 1st Sess. 1-2 (1941). The authority Attorney General Jackson sought eventually was granted. Subsequent changes have allowed the Attorney General to "extend the limits of the place of confinement" by granting furlough or work release. 18 U.S.C. 4082(c). Special forms of treatment and confinement, some of which are discretionary with the Attorney General and some with the courts, have been established for juveniles (18 U.S.C. 5032), youthful offenders (18 U.S.C. 5010 through 5015) narcotic addicts (18 U.S.C. 4253) and mental defectives (18 U.S.C. 4241). Each of these procedures operates differently and with different effects on the inmate and different problems for administrators.

b. Offenders initially are placed in the custody of the United States Marshals Service, which has access to copies of their judgment and commitment orders and any available presentence reports. Policy Statement 7300.65, dated March 22, 1972. The Service designates an initial place of confinement that appears to satisfy the prisoner's needs for custody and that has an inmate population similar to the prisoner.

As soon as the prisoner arrives at the place of initial custody, a classification study is undertaken in accordance with Policy Statement 7200.11A, dated March 6, 1972 (App. A, *infra*). The prison staff assembles background data, performs educational and psychological tests, and observes the inmate's adjustment to the institution. Several interviews are held with the inmate, both to familiarize the prisoner with the institution and its expectations of him and to enable the staff to establish a good personal relationship with the new inmate.

All of the information gathered by the staff is used by the classification committee (consisting of a caseworker, correctional counsellor, education specialist and health specialist) in the preparation of a classification study that formulates an individual correctional program meeting, so far as possible, the needs of the offender. If it is determined on the basis of this subjective evaluation that either the custodial or the rehabilitative needs of an offender could be met more adequately by another institution, the classification committee recommends the immediate transfer of the inmate to another facility.

c. The Bureau's transfer policy is delineated in Policy Statements 7300.13E, dated June 16, 1975 (App. B, *infra*), and 7400.5D, dated July 7, 1975.[18] Policy Statement 7300.13E authorizes the Chief Executive Officer of each prison to make transfers when-

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[18] The current version of Policy Statement 7400.5D is reprinted as Appendix B to our brief in *Baxter* v. *Palmigiano, supra,* and *Enomoto* v. *Clutchette, supra.*

ever "(1) program or other needs will be best served by the programs at another facility |or| (2) when the continuity of his training and/or treatment program requires it |or| (3) because the resources of the institution are not adequate to meet the inmate's problems" (App. B, *infra*, p. 25a). Whenever it is deemed advisable to make a post-classification transfer, a progress report or special progress report is prepared bringing the inmate's file up to date (App. B, *infra*, p. 40a). Such transfers may be made for a number of reasons:

> It may be for "security" if * * * it is predicated on the apprehension of general and uncontrollable disturbance or on predictions of future misconduct by an inmate. It may be for the best interests of other inmates if the prisoner is disruptive, a threat to others, or otherwise a bad influence as would be the case of a professional with continuing outside criminal contacts. A transfer may be for the best interests of the prisoner himself, for his safety or for his rehabilitation if it is believed that he will be better off elsewhere. And a transfer may be dictated by the needs or shortcomings of the institution, e.g., to alleviate overcrowding. |*Gomes* v. *Travisono*, *supra*, 490 F.2d at 1214.|

We add that transfers also may be justified by the inmate's need for medical care, or to move him to an institution closer to his point of release or more appropriate in light of the time remaining to be served. In almost all of these cases the transfer may be predicated not only on proof of the supporting facts.

but on a reasonable, subjective belief (or even suspicion) that such supporting facts are present.[19] Many of the causes for transfer simply are not susceptible of objective delineation and others—such as the safety of the inmate or the institution—although theoretically objectifiable, are so important that officials may be compelled to act before suspicions can ripen into proof.

Recognizing the diversity in situations to which transfers are addressed, and in light of the potential disadvantages of the widespread use of adversarial hearings, Policy Statement 7300.13E (App. B, *infra*) does not provide for an involvement by the inmate in the transfer decision, except to the extent that the inmate may be involved in the formulation of the progress report or special progress report. Only when a transfer is explicitly based on specific infractions of an institution's rules are hearings provided (Policy Statement 7400.5D), and then only to determine whether the infraction occurred, not whether the proposed transfer is an appropriate response. We submit this fully comports with the requirements of the Due Process Clause.[20]

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[19] The Bureau's regulations do not condition the power to transfer an inmate on the existence of any particular controvertible fact or set of facts although, of course, various facts may often be relevant to the discretionary transfer decision. This discretion is circumscribed only to the extent that hearings are provided when transfers are based, in part, upon specific violations of an institution's rules. Policy Statement 7400.5D.

[20] The government often is permitted to take actions pursuant to an authorized non-hearing process. See *Calero-Toledo*

2. *The Court Should Proceed Cautiously Before Requiring More Extensive Use Of Hearings, Which May Be Inconsistent With Custodial Needs And Rehabilitative Goals*

There are at least two affirmative reasons for believing that the use of hearings (particularly adversarial hearings) should be minimized in this context: hearings may hamper the ability of institutions to rehabilitate the inmates and they may also increase the risk of violence by disappointed inmates. We have discussed these concepts in our brief in *Palmigiano* and *Clutchette*, and we summarize them here.

Testimonial confrontations usually can be handled well in a free society. There, the antagonisms between the individual and the opposing witnesses, who hamper the attainment of the individual's desires, may be diffused in numerous ways—sometimes by the action of the hearing official or other authorities, but more often by the fact that the individual affected may return to his home and a variety of releasing activities, avoiding further contact and venting his emotions in less explosive surroundings.

Diffusion of antagonisms occurs less readily in the typical prison setting, where the parties always remain in close proximity to each other and where many inmates are characteristically impulsive. See Halleck, *Psychiatry and the Dilemmas of Crime* 284

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v. *Pearson Yacht Leasing Co.*, 416 U.S. 663; *Bob Jones University* v. *Simon*, 416 U.S. 725; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594. See generally, Freedman, *Summary Action by Administrative Agencies*, 40 U. Chi. L. Rev. 1 (1972).

(1967); Eysenck, *Crime and Personality* 144 (1964). Give and take among the inmate and the staff is a part of the daily prison routine; when differences are handled informally (or, if necessary, by fiat), potentially disruptive confrontations may be avoided. Excessive formal confrontation may damage or destroy the supervisory counselling relationship essential to the achievement of many correctional goals. Moreover, confrontation might place the inmate in a position of equal contest with the correctional officer and thereby lead to an erosion of the officer's control and authority. See McCorkle, *Guard-Inmate Relationships in Prison*, in *The Sociology of Punishment and Correction* 108-110 (Johnston, Savitz & Wolfgang ed. 1962). One important consideration, therefore, is that in the context of the prison environment direct confrontations between inmates and staff are to be avoided whenever possible. Otherwise, "prisons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boiling point * * *." *Braxton* v. *Carlson*, 483 F.2d 933, 941 (C.A. 3).

In addition, there is legitimate reason to be apprehensive that, when emotional levels are raised by continuing confrontations between inmate and staff, and between the inmate and other inmates, some inmates will resort to violence. Prisons are populated with individuals who are there because they have demonstrated their unwillingness or inability to conform their conduct to the requirements of a free society. The range of offenses for which they are in-

carcerated is broad, including many crimes of violence. By definition, prison inmates share the characteristic of having on one or more occasions resorted to seriously illegal means to achieve their goals or to resolve problems confronting them.

Inmates may be provoked into unacceptable action merely by an increase in the level of tension within the institution, which could be caused by an increased frequency of adversarial confrontations. They also may respond violently to an advance notice of a particular action that, for any of a number of reasons, is unsettling. Many inmates enter prison with feelings of hostility and frustration, perceiving themselves to have been innocent or unfairly convicted, whether or not an objective observer would agree. Such a refusal to accept guilt for wrongdoing often is accompanied by a concomitant refusal to accept the legitimacy of the authority of their custodians and a tendency to project into the custodians blame for all events occurring in prison. See Halleck, *supra*, at 306; Abrahamsen, *The Psychology of Crime* 110 (1960). As a result of both of these influences, there is an ever-present potential in prison life for a resort to violence as a means of resolving problems, a potential that could be increased to an unknown degree by the injection of advance notice and formal hearings into major portions of prison administration. The Second Circuit analyzed the problem well in *Sostre* v. *McGinnis*, 442 F.2d 178, 197 (*en banc*), certiorari denied *sub nom. Sostre* v. *Oswald*, 404 U.S. 1049:

> It is sad but true that the study of the prison subculture by psychologists and sociologists has until recently been largely neglected. Those who have looked into the problem, however, do not gainsay the volatility of relationships among prisoners and prison officials. * * * We would not presume to fashion a constitutional harness of nothing more than our guesses. It would be mere speculation for us to decree that the effect of equipping prisoners with more elaborate constitutional weapons against * * * prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner or, on the other hand, more disquieting and destructive of remedial ends. This is a judgment entrusted to state officials, not federal judges.

Cf. *Pell* v. *Procunier, supra*, 417 U.S. at 825.

3. *Many Transfer Decisions Present Issues Unsuitable For Resolution By Hearing*

A large variety of transfers—perhaps most poignantly those carried out for the safety of the inmate or for the security of the institution—are undertaken without any concrete "proof" that could be adduced in a trial-type hearing, and without any "charges" that could be the subject of notice. The object of transfers of this sort is to take action before the anticipated (or feared) event comes to pass; almost by definition, it will be action founded upon suspicion rather than proof, and it would be a negligent prison administrator indeed who waited for confirmation of his fears before taking action. Trans-

fer decisions of this sort are not amenable to *Wolff* procedures.

For quite different reasons, *Wolff* hearings are unsuitable for decisions involving transfers to different rehabilitative programs at different institutions. The important factual questions in making such transfer decisions relate either to the program at the transferee institution (a subject unlikely to be enlightened by contributions from the inmate) or to the inmate's personal prognosis. Although the inmate surely has an important contribution to make to the latter, it is most appropriately made in diagnostic interviews, in personal performance under observation in prison recreation and employment, and in communications that are incorporated in the progress report, which is an integral part of the transfer decision.[21] The inmate's contributions cannot usefully be made in an adversary hearing in response to notice of "charges."

Still other transfer decisions involve few inmate-specific facts. When a prisoner is transferred because of overcrowding, for example, the most relevant facts concern the comparative population density in the two involved institutions; because the inmate cannot meaningfully contribute to the resolution of any factual dispute about those conditions, trial-type hearings should not be constitutionally required. Where a hearing cannot serve the purpose for which it is

[21] Under Policy Statement 7200.13A, dated October 16, 1974, the inmate is shown a copy of this report.

designed, it is not inflexibly required by the Constitution.[22]

Finally, we point out that the question whether to make a particular transfer is never amenable to adversarial decisionmaking. Even when a transfer is motivated, in part, by an inmate's infractions of institutional rules, the hearing, if any is to be required, should be addressed simply to whether the alleged infraction occurred. Once prison officials have satisfied themselves that there is a reasonable probability that the inmate has transgressed, they retain the discretion with which they began—to decide in what institution the inmate should be housed. That discretionary determination is not amenable to judicial review. Cf. *Procunier* v. *Martinez*, 416 U.S. 396, 405. Accordingly, no purpose would be served by affording the prisoner a hearing on the propriety of a proposed exercise of that discretion.

[22] Even the court below has recognized that in many cases "the decision whether to transfer may not be advanced in any way by providing notice and a hearing to the transferee" (Pet. App. 6a).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

The Bureau of Prisons Policy Statement No. 7200.11A, on Classification Study and Initial Classification, dated March 6, 1972, provides in relevant part:

1. *POLICY.* It is the policy of the Bureau of Prisons to identify and utilize all available training and treatment resources in the correction of public offenders. This allocation of resources is implemented through a systematic classification of offenders and subsequent development of an individual program plan. Since the Classification Study provides the basis for developing an effective treatment program, it is essential for the report to be of professional quality and represent the integrity and best efforts of the classification team or committee.

* * * * *

4. *CLASSIFICATION STUDY.* The Classification Study is a composite of reports and forms submitted by various departments within the institutions and represents the staff's effort to identify the offender's needs and develop a correctional treatment program to meet those needs. To facilitate the review of pertinent information contained in these reports, the study will be arranged according to the following sequence;

A. Sentence Data Summary, BP 5-1

B. Background Data, Record Form 16

C. Staff Evaluation

D. Classification Summary

E. Optional Pages, Psychiatric, Psychological and/or Religious Reports

F. Program Analysis Sheet, BP Form 6.1

G. Program Plan, Classification Form 18

H. Educational Data, BP Form 7

I. Social Data, BP Form 6

J. Medical and Related Data, BP Form 8

5. *INSTRUCTIONS FOR PREPARING THE CLASSIFICATION STUDY.* In order to assure that all Classification Studies meet Bureau requirements, the following instructions should be made available to all personnel involved in the classification process. The instructions should be referred to frequently both as a guide in completing daily work requirements and as a vehicle for training.

A. *Resource Material.* Generally, resource material such as the F.B.I. Fingerprint Report, U.S. Attorney Report, Prosecuting Agency Report, and the Presentence Investigation is made available and serves as the basis for the Classification Study. It is not necessary to reiterate all the information contained in the background material but all relevant and significant information should be summarized

so that the Classification Study will be an independent report capable of standing on its own.

The Presentence Report will continue to be the major contributing resource in the preparation of the Classification Study and to the extent that it is possible, arrangements will be made to have a copy of this report mailed to the institution so that it will be available upon the offender's arrival.

The caseworker will especially need to thoroughly review the Presentence Report in an effort to coordinate his interviews so that he will be able to obtain information that will fill-in, compliment, and amplify areas in the Presentence Report that require elaboration. Interviews should not be used to gather irrelevant data, but should be considered as a probing and diagnostic tool to provide information for evaluating causative factors in the offender's involvement in crime.

When a Presentence Report is not available, all personnel involved in preparing segments of the Classification Summary will have to make a greater effort to obtain the necessary information for effective program planning. Caseworkers should pay particular attention to reports received from other departments and conduct their interviews in a way that will aid them in filling in missing informa-

tion and expand on other areas when necessary. Under these circumstances, the Classification Summary will be presented in much more detail then would be required if a Presentence Investigation Report were available.

* * * *

D. *Classification Summary.* The Classification Summary is the report that brings together information which is known about the offender's criminality, past history, and current status. In the past, this report was very brief and was designed to supplement the Presentence Report and be used in conjunction with it. The previous Classification Summary format and instructions have not produced the kind of information necessary to make enlightened case management decisions without a lengthy research of the files. It has also been noted that Classification Summaries are deficient in many instances and often inconsistent with other segments of the Classification Study. In an effort to correct this problem the Classification Summary has been revised and extended and a Staff Evaluation has been added to the Study. A sample of the format to be used for Classification Summaries is attached. All institutions should plan to reproduce this format on classification form 1b until such time that revised form 17 is made available. Once the revised classification form 17 is available, it will be used as

the face sheet of the Classification Summary and form 1b will continue to be used for subsequent pages, including the Staff Evaluation.

(1) *Current Offense.* The section on current offense should provide the necessary information to determine whether or not the offense was a joint undertaking or an independent venture, a single act or part of a series of acts, situational or a culmination of extended planning. The victim's loss and the offender's net gain should also be summarized in this section. Information under current offense should be divided into two parts.

a. *Official Version and Sentence.* It is necessary for this part of the report to be lengthy. Information related to the offense, basic sentencing data, role of the offender, codefendants, loss to the victim and aggravating circumstances can be generally presented in a few sentences.

b. *Offender's Explanation.* The offender's explanation regarding the offense is essential and should include comments regarding degree of involvement, motivation, and net gain. Again, the explanation need not be long and should represent the caseworker's interpretive summary of what the offender said.

(2) *Prior Record.* It is not necessary to list the prior record in chronological order, or to describe every incident. It is important, however, to distinguish between assaultive acts and crimes against property, between misdemeanors and felonies and between juvenile and adult offenses. The material will be summarized in two parts.

a. *Summary.* In the summary, the caseworker should stress the number and types of arrest, convictions and sentences, and response to previous supervision while confined or under parole or probation supervision. An attempt should also be made to explain any substantial period for which there were no new offenses reported.

b. *Detainers.* A brief statement regarding the status of all known charges and detainers should be made.

(3) *Past History.* Although the Presentence Investigation and other resource material provides a vast amount of information regarding the offender's background, the Classification Summary should concentrate on summarizing relevant information related to the offender's social, educational, military, and employment history. The facts should be presented as succinctly as possible, stressing only that

information which might be related to the offender's criminality.

a. *Social.* In a few sentences, the caseworker should attempt to identify any areas in the offender's social history which may have contributed to his involvement in crime. This might include the neighborhood, family relationships, marriage, physical, and mental health. Detailed information such as the father's place of birth is not necessary or desirable.

b. *Education.* At this point, the caseworker should provide only a brief statement regarding the offender's response to his educational experience, i.e., his adjustment in school and his achievements.

c. *Military.* Again, only a brief statement regarding the offender's military obligation is required. Comment on his status with the Selective Service Board and response to military experience if applicable, i.e., training, adjustment, discharge.

d. *Employment.* This portion of the Classification Summary should provide a concise summary of the offender's total employment experience.

The caseworker should attempt to describe the number and types of previous jobs held by the offender. Adjustment on the job and significant periods of unemployment should also be explained.

(4) *Current Findings.* During the initial classification process, the offender is tested, given a physical examination, interviewed, and observed to gain additional information about his character, physical and mental health and ability to change. Information obtained from these sources should be summarized under the following headings of Character Traits, Physical and Mental Health and Tests.

a. *Character Traits.* The caseworker should make a brief statement regarding the offender's assets and liabilities related to self-control, interpersonal relationships, standards and values. This statement should be drawn from information received from various departments within the institution regarding the offender's behavior, relationship with others and personal habits. As in all other segments of the Classification Summary, opinions should be avoided and the statement should be based on facts.

b. *Physical and Mental Health.* In most situations, a brief statement of the current findings regarding the offender's physical and mental health will be sufficient. If problems are diagnosed, however, the caseworker should indicate the extent and nature of the problems and comment on employability. If indicated, a more extensive report on mental and physical health can be added to the Classification Study under the section entitled "Optional Pages".

c. *Tests.* Each institution administers a number of tests to measure an offender's current standing and potential for achievement. The results of these tests plus an interpretative summary must be made available to the caseworker so that he can incorporate it in the Classification Summary. The caseworker will list all tests given and summarize what the results mean in terms of training and treatment. Any information which is available regarding testing prior to the offender's arrival at the institution should also be summarized.

6. *STAFF EVALUATION.* The Classification Study has been extended to in-

clude a comprehensive staff evaluation. The evaluation will not exceed four paragraphs and generally one typewritten page. This report represents the combined opinion of the Classification Committee or Team and is written in a way which stresses an evaluation of the facts. It will be subjective and judgmental in nature and based on suppositions. Even though it covers some of the same areas as the Classification Summary, the *Classification Summary only reports on facts.* The staff evaluation provided your opinion regarding those facts. The staff evaluation should be reproduced on Classification Form 1b with the date being typed in following the registration number, as indicated on the attached sample.

A. *Illegal Behavior.* In this paragraph, the caseworker should summarize the Classification Committee's or Team's opinion regarding the offender's involvement in crime. Emphasis should be placed on his current attitude regarding the offense, codefendants, his prior record, and pending charges. Some statement regarding his potential for future involvement should also be recorded.

B. *Casual Factors.* The Classification Committee or Team should formulate a theory regarding the offender's criminality and present situation. Such factors as the use of drugs, family problems, health, lack of education and training, emotional and psychiatric problems should be considered and an opinion expressed re-

garding their probable contribution to the offender's current situation and life style.

C. *Program Goals.* The third paragraph of the Staff Evaluation should provide a summary of the offender's correctional treatment and training needs and his program plan. Further, a statement regarding his or her willingness to take advantage of the available resources and an estimated time for completing the program should be included.

D. *Release Plans.* The final portion of the Staff Evaluation should give an opinion regarding the offender's release needs, anticipated release date, and parole readiness for commitments under the Youth Corrections Act, 4208 a-2. and the Federal Juvenile Delinquency Act. Available resources should also be evaluated along with the offender's post commitment plans.

7. *OPTIONAL PAGES.* When there are psychiatric, psychological, and/or religious reports, they should be inserted immediately after the Classification Summary.

Psychiatric or psychological reports will be scheduled by the Medical Department when indicated. Such reports should be prepared as a matter of policy in study cases.

While Chaplains will continue to conduct interviews with all newly committed offenders, they will no longer be required to submit reports on all of them.

Instead they will prepare for circulation to the team members prior to the meeting, reports on those offenders for whom such reports are appropriate in their judgment. While the spiritual and religious aspects of the offender's life still receive primary focus, the Chaplains will not limit themselves to these considerations but will also make observations in other areas when they think that such observations might be useful to the team.

8. *PROGRAM ANALYSIS SHEET.* This sheet is arranged so that the information submitted may be computerized and subjected to statistical analysis. As this data accumulates, it will reveal the areas in which our programs are sufficiently staffed and those in which they are not. These facts will be revealed about each institution and about the system as a whole.

It is extremely important that this information be accurately and conscientiously recorded because manpower decisions will be based on it. To this end, there are management control methods that department heads and wardens will need to exercise. The first obvious check is that the Program Plan be in accord with the Analysis Sheet. If discrepancies occur, especially on a regular basis, then one or the other does not give a true picture. Similarly, the totals of the men participating in given programs or achieving particular goals (e.g., the G.E.D. Certificate) should closely approximate the numbers planned for and recorded on the Analysis Sheets. If no

relationship exists between plans and outcomes, there is an obvious problem.

It is important to stress that the Central Office is trying to gather accurate information in order to plan for and justify program resources. The information can serve the same purpose and has the same value for institution management.

A. *Procedures*

(1) For each correctional factor, indicate the *level of need* by entering the Code 0, 1, 2, or 3 in the corresponding box to the right of each category.

(2) For every factor for which no program is planned enter 2 in the corresponding box to the right of the factor. If program is planned enter (1).

(3) If no program is planned enter code or codes indicating constraints (start at left and list to right side). No more than three constraints may be listed.

(4) If program is planned list activity or activities in the corresponding box (no more than five activities for any one factor).

(5) When a program is not available and a substitution is made—e.g., counseling substituted for psychotherapy because no mental health worker is available—indicate by placing [02|55] under constraints and a [10|58] under activities.

(6) For community based program place 62 and then list activity, e.g., [62|50] indicates study release.

B. *Minimum Program Guidelines.* It is required that offenders be programmed according to the following chart:

Category	Minimum Programming
I	Activities for at least 4 factors*
II	Activities for at least 2 factors*
III	No minimum requirement

* The *Same* program activity can be planned to deal with needs present under *one or more* factors.

Adherence to these guidelines and a comparison between the Program Analysis and the Program Strategy will guard against cases being handled perfunctorily.

The completed Program Analysis Sheet will be kept in the inmate's institutional folder; *a copy will be sent to the Bureau's Information Branch.*

9. *PROGRAM PLAN.* The Program Plan continues to be an important guide in establishing an effective treatment program for offenders.

A. The Staff Evaluation paragraph should be deleted, however, and a new paragraph entitled Transfer Recommendation, should be added. If it appears that the offender is not suitably classified for the program as your

facility, the paragraph of Transfer should be completed and explain your rationale for moving him to another facility.

B. *Environmental Factors.* The correctional factors to be considered in this area are those of Economic Status and Family Conditions. If the staff decision is to apply treatment resources in these areas, the goals of the treatment shall first be spelled out in such a way that progress can be noted and achievement documents. The program to be followed should be outlined in equally specific terms. The form permits variation of review dates if this is considered advisable.

C. *Health.* This section applies to both mental and physical health. Medical goals are sometimes independent of other treatment goals. However, where possible, these decisions should be integrated with other factors such as sentence length, training programs, transfer plans, etc.

D. *Skills.* Both educational and vocational areas should be considered in this area of planning. If resources are to be applied in either or both areas, the goals should be clearly stated. Relatively speaking, it is easier to state goals in measurable terms in these fields than in most of the others. Both goals and program, therefore should be phrased in measurable concrete terms.

E. *Character Traits.* In this section, we consider the correctional factors of self-control, interpersonal relationships, standards and values, and aspirations. These terms and concepts are the most difficult to deal with in measurable behavioral terms and yet the most vital elements of progress are contained here. Each classification group must make a continuous, sincere effort to state their goals, and their plans to achieve them, in behavioral terms. From this effort we should reap improved and refined ideas and ways of expressing them.

10. *SPECIAL TYPE OF CASES*

A. *Processing of Commitments for Study under S. 5034, 5010(e), and 4208(b)*

(1) *Delays in Delivery of Study Cases.* Whenever an offender committed under Section 5034, 5010(e), or 4208(b) is not received by the designated institution within 10 days from the date of the designation made, the Chief, Case Management, at the institution or his delegated representative, shall contact the appropriate United States Marshal's Office by telephone and urge prompt delivery because of the deadlines involved. If the commitment to the institution has not been made within 15 days from the date the designation was made, the institu-

tion shall notify the Bureau by telephone, Office of the Assistant Director, Institutional Services Division.

(2) *Requests for Extensions of the Study Period.* Whenever circumstances such as the inability to collect necessary or reliable data within the time limit allotted for the study, need for more extensive psychiatric or medical examination, etc., indicate the necessity for more time than has been provided in the initial commitment, an extension should be requested. However, this should be an infrequent occurence and extensions should be requested only if absolutely necessary. The chief administrative officer of the institution shall request extensions from the sentencing judge, usually not to exceed 30 days. A copy of the letter and subsequent reply should be forwarded under brief cover memo to the Office of the Assistant Director, Institutional Services Division. Since the Bureau maintains control cards on all study cases, we must receive either the study material or notification that it will be late, 30 days prior to the date the recommendations are due in court.

(3) *Preparation of Classification Study.* Particular attention should be given to the following:

a. When it is ascertained that a Presentence Report has not been prepared by the United States Probation staff, a post sentence report should be requested and every effort should be made to verify and authenticate the information provided by the offender. If information is obtained from the offender, the study report should reflect the source of the material and indicate whether or not it has been verified.

b. In many cases there is a rather obvious reason for the court's request for study. In other cases the purpose is not immediately clear. When there is any doubt in the caseworker's mind regarding the reason for study, he should telephonically contact the United States Probation Officer to clarify the court's concern. Once this has been determined, the study should deal effectively with the areas of the court's concern.

c. The Program Plan and Analysis Sheet (BP 6.1) should be omitted from the study. The Classification Summary will follow the same format used in a regular Classification Summary only it may occasionally be necessary to expand certain segments of the re-

port. The Staff Evaluation will also be the same as that prepared for a regular study and special care should be taken to assure that it represents the total group judgment of the team or committee.

d. When probation is recommended for certain types of community treatment, we believe it should first be determined that the necessary treatment resources are available in the community. We would encourage telephonic communication with the United States Probation Officer in these cases in order to determine whether your recommendations are realistic. Care should be taken, however, to advise the United States Probation Officer that you are only evaluating potential resources and that a final decision has not been made regarding a recommendation to the court. The availability of resources should be spelled out in the Staff Evaluation section of the report.

e. Specific recommendations as to sentence disposition should be included only in the transmittal memo or letter to the court and should *not* appear anywhere in the classification study.

f. Study cases should be assembled as follows: Face Sheet (Record Form BP 5.1); Record Form 16; Staff Evaluation; Classification Summary; Psychiatric, Psychological, and Religious Reports; Form BP 6, Social Data; Form BP7, Educational Data; and BP 8, Medical and Related Data.

g. It is imperative that we prepare comprehensive, well-organized, well-integrated, and well-written classification studies on all offenders committed by the court for study and observation. Particular care should be taken in regard to appearance, grammar, clarity of style, and material consistency. Also, special attention should be given to providing clear and legible copies of the study for submission to the court. All material in the study should be reproduced in the same manner.

(4) *Transmittal of Classification Study and Institutional Recommendations to the Bureau on 4208(b), 5034, and 5010(e) Study Commitments.*

a. Five copies of the classification study and one copy of the Presentence or Post Sentence report shall be submitted to the Bureau, Office of the

Assistant Director, Institutional Services Division, as promptly as possible. In 4208(b) commitments, this material will be submitted within 60 days from the date commitment was imposed, unless an extension has been requested and granted. In 5034 and 5010(e) commitments, material will be submitted within 45 days from the date commitment was imposed, again, unless an extension was requested and granted. Although a specific period of time is allotted for studies (90 days for 4208(b), (60 days for 5034 and 5010(e), it is not necessary that the allotted time be used. Expeditious preparation and submittal of study cases is encouraged, regardless of the amount of time provided by the statutes.

b. In 4208(b) and 5034 cases, the institution recommendations shall be forwarded in the form of a single spaced letter to the sentencing judge for the signature of the Director, Bureau of Prisons. In the past this has been in the form of a draft letter. However, this policy is being discontinued and the letter should be of such high quality that it can be

forwarded directly to the Director for his signature.

c. Each institution should maintain a file containing copies of Bureau study case letters, forwarded to the courts, for training purposes. Special attention should be given to the outline and structure of these letters. Additionally, letters to the court should flow logically from the Staff Evaluation and should be written in a concise, straightforward style. Jargon and theorizing should be avoided. Since a summarization of pertinent factors will have been done in the Staff Evaluation, the main function of the letter is to convey a specific recommendation to the court as to disposition and to briefly outline plans for training and treatment. The treatment plan should support the recommendation. It should not exceed one page in length (single-spaced) and the letter should be undated.

d. In 5010(e) cases, the Chairman of the Youth Division, United States Board of Parole makes the recommendation to the court. However, the institution recommendation shall be

forwarded to the Bureau by a cover memorandum summarizing the staff's recommendations for disposition and their suggestions for specialized treatment and training.

e. The institution staff, particularly the caseworker who drafted the initial letter in 4208(b) and 5034 study cases, should review the copy of the Bureau's final letter to the court. Similarities and differences should be noted. Perhaps, in this way we can all address ourselves to similar issues and approach a common style.

• • • •

APPENDIX B

The Bureau of Prisons Policy Statement No. 7300.13E, on Delegation of Transfer Authority, dated June 16, 1975, provides in relevant part:

1. *POLICY.* The Bureau of Prisons attempts to place all committed offenders in the correctional facility for which they are most appropriately classified in terms of age, place of residence, offense, sentence, and prior record.

2. *PURPOSE.* In order to implement this policy, the Director has delegated the authority to the Chief Executive Officer of each federal facility to transfer offenders from one institution to another, or to an approved non-federal facility. This delegation will assure expeditious movement of an offender to an institution for which he more properly classifies.

* * * * *

5. *GENERAL GUIDELINES*

a. A significant number of transfers will be for the purpose of placing newly committed offenders in institutions for which they more properly classify. To provide classification committees and teams with current information as to the mission of each federal institution, there is attached to this delegation Appendix A, which describes the population, characteristics, commitment areas, security limitations, and significant program resources

of each institution. The overall integrity of this classification system must be preserved.

b. Generally, transfer consideration is most appropriately given at the time of intake screening, initial classification, or at regularly scheduled reviews.

c. At an inmate's initial classification, the staff should attempt to plan a complete program for the entire period of confinement, including both institutional and post-release phases. In making this plan, all the resources of the Federal Prison System should be considered.

d. Transfer should be considered when it becomes apparent that the offender's:

(1) program or other needs will be best served by the programs at another facility

(2) when the continuity of his training and/or treatment program requires it

(3) because the resources of the institution are not adequate to meet the inmate's problems

Then the Chief Executive Officer may issue an order directing the transfer of the offender to a more appropriate facility following the guidelines in Appendix A, and subject to the limitations and procedures outlined in this policy statement.

e. In the exercise of this transfer authority, the Chief Executive Officer must be particularly

alert to the limitations (section 6) regarding the place of confinement for misdemeanants, juveniles, youths, addicts, and mentally-ill offenders.

6. *LIMITATIONS AND REGULATIONS*

a. *Federal Juvenile Deliquency Act* cases may be transferred under this delegation of authority to another juvenile or youth institution (namely Pleasanton, Englewood, Ashland, and Morgantown) according to the procedures established in this policy statement. Transfers of FJDA commitments to an institution other than the four named above must be referred to the Regional Administrator, Case Management Branch, for approval.

Transfers of FJDA commitments from Youth Centers to other federal institutions will be approved when it is demonstrated that those programs are clearly warranted; e.g., when the inmate is assaultive and staff and/or inmates are in jeopardy, or when an inmate is a serious escape risk. Under no circumstances will FJDA cases be placed in a penitentiary; placement in FCI's will be limited to those which have large numbers of youthful offenders, e.g., Milan, Tallahassee.

b. *Youth Corrections Act* commitments shall be classified at the receiving institution, where the initial parole hearing will also be given. Following this hearing, or any appropriate

time thereafter, the youth offender may be transferred by delegated authority to another more appropriate *youth* institution without referral to the Regional Case Management Branch. Youth offenders recommended for an adult correctional facility at the time of initial classification or at any later date, shall be referred to the Regional Administrator, Case Management Branch for approval. (See paragraph 7 b. for exceptions).

Any youth offender, having once been authorized for transfer to an adult Federal Correctional Institution, may be transferred under delegated authority to some other, more appropriate, adult FCI. However, any youth offender authorized for transfer to a penitentiary by the Regional Office may not be transferred to another penitentiary under delegated authority; each transfer of this nature must be approved by the Regional Case Management Branch.

c. *NARA, Title II* cases remain at the institution where they are committed unless specific Regional Office authorization is granted. Recommendations require a full progress report and should be forwarded to the Regional Case Management Administrator who will confer with the Regional Mental Health Administrator.

d. *Misdemeanants,* i.e., those offenders who have

been convicted of offenses for which the maximum penalty is one year or less, may not be transferred to penitentiary-type institutions without first obtaining a waiver-Record Form No. 37. Having obtained a waiver, the general delegation of authority may be used as appropriate.

e. *Split sentence* offenders committed under the provisions of Title 18, U.S. Code, Section 3651, may not be transferred to penitentiaries. Under this statute, they may be placed only in "jails or treatment institutions".

f. Offenders having *detainers and probable pending charges*, may be transferred under this delegation of authority to an institution for which they properly classify. Ordinarily, persons in this category should not be moved to an institution more distant from the detaining authority unless there is substantial reason to believe that the detainer will be dropped, or that the pending charge will not be prosecuted. Inmates who indicate an intention to oppose extradition should not be moved under this delegated authority into an institution within the state responsible for placing the detainer. Such cases, and others in which there are legal and/or jurisdictional problems, should be referred to the Regional Administrator, Case Management Branch. Also, Policy Statement 7500.14A should be reviewed concerning this type of transfer.

g. All transfer recommendations for the *concurrent service* of federal and state sentences shall be referred to the Regional Administrator, Case Management Branch, after it is determined that a state will accept the offender. Institutions must instruct U.S. Marshal to place detainer.

h. *Medical and/or Psychiatric Transfers* to the Medical Center for Federal Prisoners, Springfield, Missouri and FCI, Lexington, Kentucky, for either psychiatric or medical care shall be cleared with the Director, Medical Center, or the Chief Executive Officer, Lexington, Kentucky, or authorized representative, prior to effecting the transfer. Upon their advice that facilities are available, and that the referral is suitable, the transfer may be effected. Generally, such referrals are made on the basis of a progress report which includes additional medical or mental health information required in order to make an informed decision. In emergency situations, telephone contact communications may be used to expedite the transfer, followed by appropriate documentation.

The Director of the Medical Center and the Chief Executive Officer, Lexington, are delegated authority to issue transfer orders to return both medical and psychiatric hospital patients, upon recovery, to any appropriate institution, (subject to the broad guidelines of

this Policy Statement). The prospective receiving institution must be notified prior to the issuance of a transfer order. Unusually complicated situations should be referred to the Regional Case Management Branch, in the sending institution's geographic area.

i. *Transfer to local hospital.* When a determination is made that an inmate requires bona-fide emergency inpatient care and should be admitted to a community hospital or government hospital other than one operated by Bureau of Prisons, the Chief Executive Officer of the institution is authorized to issue an order transferring custody of the prisoner to the U. S. Marshal in whose District the hospital is located.

(1) Since these emergency transfers are frequently made hastily, the Marshal should be notified by telephone or teletype, at which time he will be advised regarding the degree of supervision the Warden believes is necessary. This information should be contained in a memorandum covering the transfer order which will be sent to the Marshal as soon as possible.

The cover memorandum which accompanies the transfer order to the Marshal shall include the following paragraph:

"Pursuant to authority delegated to me by the Director, Bureau of Prisons, this is your authority to accept custody of the above-named for commitment to the hospital indicated in the transfer order. By this memorandum, you are authorized to pay the hospital expenses. Please forward the usual jail record cards (Form DJ-100) showing commitment to and discharge from the hospital."

The Bureau's copy of the cover memorandum should be marked for the attention of the Medical Director, Division of Health Services, Bureau. This copy should include a statement regarding the medical reasons for hospitalization.

The Marshal is responsible for paying the costs of hospitalization and treatment. He is also responsible for providing supervision if he determines this is needed. The institution should cooperate with the Marshal by providing supervision until the Marshal is able to arrange for such guards as may be needed.

The Regional Director or his designee (usually the Regional Medical Services Administrator), will be notified that the patient has been transferred to the hospital.

(2) Whenever inpatient care in a local hospital is considered advisable, and no emergency is involved, the advice of the Regional Director or his designee will be obtained prior to issuance of the transfer authorization. This will not apply to Springfield and Lexington.

(3) When the institution is notified that the hospital is ready to discharge the patient, the Warden should issue another transfer order re-transferring the patient from the Marshal to the institution.

j. Offenders in *holdover status* (who are in the process of being transferred—at either the sending or receiving institution), should not be diverted from the intended receiving institution. If, by reason of their adjustment, or other extenuating circumstances, they should not be moved to the receiving institution, referral should be made to the Regional Administrator, Case Management Branch.

(1) Prior to the transfer of FJDA or YCA inmates, the institution will rubber stamp the file (on the outside) "FJDA or YCA OFFENDER." This will alert receiving institutions of the need for special handling. All institutions housing FJDA and YCA offenders will follow Administrative Detention procedures. This means that, in addition to the direct supervision afforded by the Unit Officer, each FJDA or YCA holdover shall be seen daily by a member of the Medical Department and one or more other responsible officer(s) designated in the local policy issuance.

(2) In the event these FJDA or YCA cases require holding longer than 24 hours, a status report will be submitted daily via TWX to Population Control, Central Office. Included should be length of time in holdover status and any other information not routine in nature; for example, control or health problems that are encountered.

FJDA or YCA offenders will be housed separately when possible and not with adult sentenced offenders.

k. *Close Supervision Cases.* Reports on inmates who have been housed in Administrative Detention thirty consecutive days or more, and who refuse to re-enter the general population, will be forwarded to the Regional Office for review and transfer consideration. (Inmates who are Special Offenders are excluded from this category).

If the inmate remains in the Administrative Detention for 60 days and transfer is not resolved, the matter will be referred to the Assistant Director, Correctional Programs Divi-

sion, Central Office, for a decision. (See Policy Statement 7900.51).

l. *Separation Cases and Special Offenders.* When it becomes necessary to transfer inmates who are "stamped cases" (P.S. 7900.47), the recommendation should be referred to the Population Control Section in the Central Office. Also, when the location of codefendants is not known, inquiry should be made of this same office.

m. If a *group disturbance* occurs, it may be necessary to move some of the participants. The Chief Executive Officer should confer with the Regional Director regarding transfer decisions who in turn, will contact the Assistant Director, Correctional Programs Division, regarding disposition of those inmates most seriously involved. This will insure that the Director is informed regarding the resolution of the incident, the overall needs of the Prison Service are taken into account, and that transportation is arranged promptly.

n. Any transfer for *disciplinary reasons* must be accomplished in accordance with procedures outlined in Policy Statement 7400.5, Inmate Discipline.

o. *Community Centers*

(1) The authority to effect transfers to and from Community Treatment Centers has

been delegated to the Chief Executive Officer of the institutions and Centers involved. Transfer authority for directors of non-federal facilities is limited to placing an offender in the custody of the nearest U.S. Marshal. These failures will be referred to the CPO for transfer decision.

(2) Community Treatment Centers are to provide assistance to offenders who do not have independent resources and who would find it difficult to adjust in the community without the services of the Center. Priority consideration should be given to those individuals who lack a job, a place to live or the necessary self confidence to develop resources on their own.

Community Centers are not intended to be used as a reward or solely as a means of returning an offender to the community earlier than the time established by the expiration of his sentence or a parole date. Therefore, transfers should only be approved when it is apparent that utilization of the Center's resources might have a positive impact on an individual's ability to avoid future illegal behavior.

In addition, when reviewing a request for transfer to a Community Treatment Center, the following eligibility criteria should be followed:

(a) Generally, individuals should be within six months of their release date. Plans for greater program duration should be discussed with the CTC Director prior to transfer;

(b) All special offenders being considered for transfer to a CTC, whether release is by MR, parole, or expiration, must be referred for approval to the Assistant Director, Correctional Programs Division, Central Office;

(c) Generally, individuals who have been convicted of violations of financial trust or of an organized, sophisticated offense have little need for CTC programs. Financial trust offenders may be approved by the Warden or Chief Executive Officer, but a special memorandum must be written for the file giving the rationale for the CTC placement. Individuals who have been involved in organized, sophisticated offenses are to be referred to the Central Office for approval.

(d) Those individuals convicted of, or charged with serious or repetitive crimes of violence against a person are generally excluded from CTC programs. If there is reason to consider such an individual, they may

be approved by the Warden or Chief Executive Officer. If such a person is approved, a memorandum must be prepared for the individual's file giving full rationale for the approval, if transfer to a CTC is not stipulated by the Board of Parole. If parole is granted with such a stipulation, no memorandum need by prepared.

(3) Because of the limited capacity and unique nature of community centers, no transfer into a center shall be effective prior to receipt of advice from the Center Director that space is available.

FJDA and YCA offenders will ordinarily not be transferred into a Center until the Youth Division of the United States Board of Parole has set a release date, or until the youthful offender is within 120 days of his release.

p. Transfer recommendation for *boarding federal offenders* in non-Federal Correctional Facilities, for reasons other than protection, shall be referred to the Regional Administrator, Case Management Branch in the Region in which the non-federal facility is located, if the transfer is out of the referring institution's region, or the inmate presents problems. The region will make referral if appropriate.

Otherwise, the institution may refer the case directly to state institution with a copy to the region. Upon approval, the referring institution must forward a copy of the Judgment and Commitment, sentence data with adjustments for extra or forfeited good time, and file material to the state facility. A copy of the sentence data, with instructions to place a detainer shall also be forwarded to the U.S. Marshal in the district in which the state facility is located and to the Regional Case Management Administrator where the facility is located.

q. *D. C. Department of Corrections* referrals should be forwarded to the Assistant Director, Correctional Programs Division, Central Office. D.C. Department of Corrections gives priority to D.C. Code offenders who have made adequate adjustments. U. S. Code offenders are primarily referred for pre-release purposes. Full classification material must accompany referral.

7. *RELATIONSHIP WITH OTHER AGENCIES*

a. *The U. S. Probation Office* must be involved when transferring an offender for release planning purposes. If there is reason to doubt the offender's claim to residence, and/or release resources at the proposed destination, the approval of the receiving Probation Officer will be received before issuing the transfer order.

b. The rules of the *United States Board of Parole* require initial hearings for offenders committed under FJDA, YCA, or Section 4208 (a)(2) immediately after classification. Unless there is definite airlift or bus schedule information to show that the offender can be transferred and receive his initial hearing on a date as early as he would have at the transferring institution, transfer should be deferred until the hearing is completed. Persons awaiting mandatory release or parole violator hearings *should not* be moved until after the hearing has been completed.

The Board of Parole should be kept fully and promptly advised of transfer activity on persons awaiting parole decisions and on those who have been granted parole dates. Those scheduled for Parole Board or Youth Division hearings within 60 days should not be transferred until after the hearing is completed. Special circumstances which might necessitate exceptions to this rule should be cleared with the Board or Division ahead of time.

c. *Courts.* The Chief Executive Officer will assure himself that any complicating jurisdictional and legal problems are resolved before transfer is accomplished. Thus, an offender who has legal action pending should not be transferred without prior consultation with the appropriate U. S. Attorney or referral to the regional counsel.

8. *PROCEDURES*

a. Ordinarily, a decision to transfer an offender should be made at initial classification, or at another regularly scheduled review, for which a complete progress report is prepared. Occasionally, transfer action will be necessary as a result of some unanticipated or emergency circumstance. At such time, a special progress report bringing the entire case up to date, should be prepared. Whenever a full progress report was prepared within 90 days of transfer consideration, a memorandum report, bringing the case up to date will suffice.

b. When consideration is being given to transfer, the Chief Executive Officer will send a copy of the progress report to the Chief Executive Officer of the proposed receiving institution for his comments and concurrence. If they are not able to achieve agreement, the referring institution will bring the matter to the attention of its Regional Director. (Copies of Institution correspondence concerning the referral plus current progress report should be forwarded to the Region). When the institutions involved are in different regions, the referring Regional Office will contact the Regional Office in which the other institution is located.

If the Regional Officers are unable to come to an agreement, the matter will be referred to

the Assistant Director, Correctional Programs Division, for final decision.

c. Each institution is authorized to duplicate blank transfer authorizations. An original and one copy of each order are necessary. (Institutions may wish to prepare an additional copy for their own statistical purpose, but this is not required by this regulation.) A number of federal courts have held, in prosecutions for escape, that the Government must prove the legality of commitment by competent evidence, such as this form.

In order to have the requisite documentation readily available, the "Return of Service" will be executed on the original of the transfer order. Also, in all transfers to Community Treatment Centers (federal or contract non-federal) and in all transfers to non-federal work-release facilities, each copy of the transfer order shall carry the typed notation: "This transfer is effected under the provisions of Section 4082, Title 18, U.S.C." Therefore, as a transfer movement begins, the original transfer order will be placed in an envelope stapled to the A/W control card and attached to the outside of the Messenger Envelope (Std. Form 65) containing the complete inmate file. The Officer who completes the transfer at final destination will execute the "Return of Service" on the original transfer

order, and this will be filed with the commitment papers.

One copy of the transfer order will be placed inside the central file folder upon departure along with the usual material which includes the rationale for transfer. This will serve as the file copy for the receiving institution.

d. The reason for transfer, according to the following code, should be shown on the original and each copy of the transfer order. It is recognized that there may sometimes be overlapping reasons for the transfer. In such instances, please show the primary reason.

With the exception of Code 290, all transfers must be referred to and accepted by the receiving institution. District of Columbia offenders are not to be transferred under Code 290. All D.C. offenders must be referred and accepted by the receiving institution. Also, no inmate shall be transferred to Marion under Code 290. They must be referred to the Warden at Marion for approvel.

Code	
290	*Institution Classification.* (This reason is most appropriate for transfers made at initial classification, and will usually involve transfer to an institution of a different type.)
291	*Nearer Release.* (This reason will be used when transfer is made to an institution nearer the offender's release destination, either at time of initial classification or at a later date.)

Code	
292	*Adjustment Purposes.* (This reason will ordinarily be used when the inmate is moved primarily for the purpose of providing closer supervision and controls. It is related to poor institutional adjustment and must be supported by documentation or misconduct according to the procedures specified in the Disciplinary Policy Statement.)
293	*Closer Custody.* (This reason will be used when custody, in terms of escape, is the primary concern.)
294	*Medical Attention.* (This includes persons moved for medical and psychiatric care, surgery, and narcotic addiction.)
295	*Medical Treatment Completed.*
297	*Training Purposes.* (Transfer made for participation in a specific training program, as dental laboratory at Lewisburg, machine die and tool at El Reno, etc.)
298	*Work/Study Release.* (When transfer is made specifically for participation in work-release program at receiving institution.)
299	*Community Centers.* (All transfers into guidance centers or other community residential centers)
300	*Temp. Transfer* (to custody of U.S. Marshal or local authority.)
301	*To Relieve Overcrowding.*
302	*To Build Up Population*
304	*Drug Abuse Program.* (Non-NARA)
305	*Other.*

e. Reporting transfers on Forms BP-1 and BP-2. Special Attention; Records Control Supervisors. When reporting transfers on Form BP-2

(Daily Report of Discharges), enter in column 7, the code indicating reason for transfer. (See instructions pertaining to Form BP-2, contained in Policy Statement 42110.1)

9. *AUDIT OF TRANSFER ORDERS ISSUED PURSUANT TO THIS DELEGATION*

The Regional Administrator of Case Management is delegated responsibility to audit transfers made under this delegation of authority. In addition, each institution should promptly report to the Regional Office any problems encountered, both as a transferring and a receiving institution.

/s/ Norman A. Carlson
NORMAN A. CARLSON
Director, Bureau of Prisons
Commissioner,
Federal Prison Industries

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-520

ERNEST L. MONTANYE, former Superintendent of Attica Correctional Facility, and HAROLD SMITH, former Deputy Superintendent of Attica Correctional Facility,
Petitioners,

vs.

RODNEY R. HAYMES,
Respondent.

BRIEF OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The interest of the State of California in the issue raised by the Petition for a Writ of Certiorari is generated by several interrelated concerns.

First, in the fiscal year 1974-1975 the number of transfers of males from Reception Centers and between institutions of the California Department of Corrections exceeded 30,000. (Appendix C, pp. 59a-60a). Accordingly, any decision reached by this Court

with respect to transfers will have a significant impact upon the management of the California prison system.

Second, inmate transfers are not readily susceptible of being cast in a single mold. Objective and subjective variables, generated by predictable and unpredictable occurrences, preclude formulation of a universal model. The regulations of the California Department of Corrections reflect such potentialities (i.e. Appendix B, pp. 7a-58a). Accordingly, any determination by this Court which casts doubt upon the propriety of acknowledging the reality of such variables would have a significant impact upon the formulation by the California Department of Corrections of transfer procedures.

Third, inmate transfers are a critical component in the achievement of the objectives of the correctional system. The movement of inmates is not solely a means for achieving the most economic utilization of available facilities and staff. Rather, it is a process whereby the dual objectives of security and rehabilitation may be served. Moreover, it is a process wherein conflicts between the needs and desires of a particular inmate and the welfare and security of the correctional system as a whole may be brought into sharp focus. It is thus a process wherein correctional officials may be faced with the difficult task of arriving at a proper accommodation between the dual objectives of security and rehabilitation. In short, it is an area of ultimate significance and difficult choices. The procedures of the California Department of Corrections for the transfer

of inmates have not remained static. Significant procedural changes have recently been implemented (*see* Appendix A, pp. 1a-6a). However, the implementation and operation of these procedures is the subject of an ongoing study. As this is thus an area wherein policy determinations must and are being made, and wherein new procedures should and are being considered, any determination by this Court which limits the discretion of correctional officials would have a significant effect upon the development of transfer procedures.

SUMMARY OF ARGUMENT

A person committed to state prison following his conviction of a crime has no property or liberty interests in remaining in a particular institution within the state's prison system. An inmate has no claim of entitlement to placement in any one particular institution. Accordingly, procedural due process is not mandated by the Fourteenth Amendment.

The decision by correctional officials as to which institution each inmate committed to their custody should be located in is a question of policy and judgment. The establishment of any mandatory guidelines is a legislative, not a judicial, matter.

The continuing development of procedures for transferring inmates between institutions should remain within the sound discretion of correctional officials. At a time when practices are diverse, and when new procedures are being explored, curtailment of development should not be imposed.

ARGUMENT

I

A PERSON COMMITTED TO STATE PRISON UPON HIS CONVICTION OF A CRIME HAS NO PROPERTY OR LIBERTY INTERESTS IN CONFINEMENT IN A PARTICULAR INSTITUTION.

The Constitution does not require that every government impairment of some interest be conditioned on notice and an opportunity to be heard. *See Cafeteria Workers v. McElroy,* 367 U.S. 886, 894 (1961). "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. (Footnote omitted). But the range of interests protected by procedural due process is not infinite." *Board of Regents v. Roth,* 408 U.S. 564, 569-570 (1972).

As further observed by this Court in *Roth,* "[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interests at stake. *See Morrissey v. Brewer, ante,* at 481. We must look to see if the interest in within the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth, supra,* 408 U.S. 564, 571 (1972).

The concept of liberty has been broadly construed so as to encompass not only freedom from physical restraint, but also the freedom to pursue and enjoy those privileges long accorded to free men. *Board of Regents v. Roth, supra,* 408 U.S. 564, 572 (1972). As a consequence of having been convicted of a crime and

of having been committed to state prison, an inmate is necessarily subject to physical restraint, and his activities are delineated by his custodians. *See Preiser v. Rodriguez,* 411 U.S. 475, 491-492 (1973). In short, by virtue of his conviction, an inmate has forfeited the freedom to be free of restraint and to do as he pleases. It is submitted that by virtue of his status, an inmate does not have a liberty interest in being placed in any particular institution within a state prison system. It is further submitted that confinement in one institution as opposed to another cannot be equated with the conditional grant of "many of the core values of unqualified liberty . . ." *Morrissey v. Brewer,* 408 U.S. 471, 482 (1972).

As further observed by this Court, "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . [¶] Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth, supra,* 408 U.S. 564, 577 (1972); *see Wolff v. McDonnell,* 418 U.S. 539, 557 (1974).

Accordingly, an inmate can have no property interest in being retained in a particular institution unless state law grants him an entitlement to be placed in that par-

ticular institution. A statutory scheme which is premised upon the maintenance of a variety of institutions (*see* Cal.Pen.Code § 5003), but which grants correctional officials the authority to determine the institution in which the person is to be confined (*see* Cal.Pen. Code § 5068), and the authority to transfer persons from one institution to another (*see* Cal.Pen.Code § 5080), precludes the recognition of a property interest in being placed or retained in one particular institution.

Accordingly, an inmate who is transferred from one state institution to another state institution is not deprived of liberty or property which is protected by the Fourteenth Amendment.

II

THE DETERMINATION OF WHICH INSTITUTION EACH INMATE SHOULD BE PLACED IN IS A MATTER OF POLICY AND INVOLVES AN EXERCISE OF JUDGMENT.

As recognized by this Court, "The operation of a correctional institution is at best an extraordinarily difficult undertaking." *Wolff v. McDonnell,* 418 U.S. 539, 566 (1974). As further recognized by this Court, all persons who have been convicted of crimes cannot be readily grouped into a single category. "Inevitably there is a great range of personality and character among those who have transgressed the criminal law. Some are more amenable to suggestion and persuasion than others. Some may be incorrigible and would merely disrupt and exploit the . . . process for their own end. With some, rehabilitation may be best achieved by simulating procedures of a free society

to the maximum possible extent; but with others, it may be essential that discipline be swift and sure. (Footnote omitted)." *Wolff, supra,* 418 U.S. at 563. Additionally, in evaluating any procedure utilized in the institutional setting, "the necessity to maintain an acceptable level of personal security in the institution, must be taken into account . . ." *Wolff, supra,* 418 U.S. at 563.

In a multi-institution prison system, these concerns are brought into focus by the necessity of reaching a determination as to the most appropriate institution for each inmate. This necessitates a judgment as to the personality and character of the inmate, an assessment of his particular needs, a determination of the institution which can best meet these needs, and an evaluation of the effect of placement in an institution on the level of security.

In a large prison system, the number of such decisions is a factor which cannot be ignored. In fiscal year 1974-1975, there were more than 30,000 transfers of male prisoners from Reception Centers and between institutions of the California prison system. (Appendix C, pp. 59a-60a). All of these transfers cannot be subsumed under a single category (*see* Appendix B, pp. 7a-58a).[1]

The evaluation process may vary depending upon the availability of prior information, and the decision reached may be affected by the length of time which the inmate is expected to serve in prison. Accordingly,

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[1]Chapter VII of the Inmate Classification Manual, which is not reproduced in the Appendix, contains provisions for other specialized transfers. In general, it concerns transfer of wards of other agencies who are handled in a cooperative relationship with offi-

different considerations come into focus depending upon whether the inmate is newly committed, has been returned following a parole violation, or is scheduled to be released within several months.

A variety of factors must be evaluated in determining the most appropriate institution for each inmate. Certain factors might be generally classified as rehabilitation needs. Included in this category are such considerations as vocational needs, educational needs, medical, dental, and psychiatric needs, facilitation of family visiting, and preparation for release. Other factors may be generally categorized as management and custody needs. Included within this general category are such concerns as the need for more secure housing, the need for less secure housing, the need to separate an inmate from enemies, the need to reduce prison gang affiliations, disciplinary concerns, the need to separate crime partners, and the need to afford an inmate protection from other prisoners. Another set of factors might be generally characterized as administrative needs. Included within this general category are such factors as the need at certain institutions for inmates who are qualified for certain work assignments, and the need to shift population due to a heavy intake, or the shifting of special programs from one institution to another institution, or the deactivation

cials of those agencies, and of inmates who are the responsibility of the Department of Corrections, but who require special transfer considerations. Included within the second category are exchanges of prisoners with the Federal Bureau of Prisons (Cal.Pen.Code § 2911), exchange of prisoners with other states (Cal.Pen.Code §§ 2911, 1190), inmates with death sentences, inmates with commuted death sentences, inmates serving life terms, and mentally ill inmates transferred to the Department of Health (Cal.Pen.Code §§ 2684-2685).

of a particular institution or a section of a particular institution.

In circumstances where a variety of these factors are relevant, the determination of the appropriate institution becomes more difficult and requires a balancing of the interests in rehabilitation, security, and proper administration of the prison system. Certain needs, such as the need for dental care, may be objectively determined. Other needs, such as the appropriate level of custody, must necessarily be based on an exercise of sound judgment and discretion. In some circumstances, the transfer determination can be made through procedures which necessarily require a certain time period for completion, whereas in other circumstances, an immediate decision is required. In some situations, it may be possible to clearly document the necessity for a transfer, whereas in other situations, prison administrators must exercise their discretion and determine whether the probability of serious difficulties or breaches of security is sufficiently high to warrant a transfer.

In summary, determining the appropriate institution in which each inmate is to be placed in a complex and difficult task. It is an area wherein the experience, knowledge, and judgment of the correctional officials who are charged with the responsibility of the welfare and security of the inmate is indispensable. "[I]n the current environment, where prison disruption remains a serious concern to administrators, . . ." (*Wolff v. McDonnell*, 418 U.S. 539, 568 (1974)), the development of standards and procedures should remain with the correctional authorities.

III

AT A TIME WHEN PRISON PRACTICES ARE DIVERSE AND EXPERIMENTAL, THE CONTINUED DEVELOPMENT OF PROCEDURES AND STANDARDS SHOULD REMAIN WITH THE OFFICIALS OF THE STATE PRISONS.

The procedures utilized by the California Department of Corrections in arriving at determinations as to the appropriate institution in which each inmate should be placed have not remained static. Those procedures which are set forth in Appendix A, pp. 1a-6a, reflect relatively recent changes in the procedures utilized by the Department. Moreover, the implementation and operation of these procedures is the subject of an ongoing study.

Accordingly, it is submitted that "[t]he better course at this time, in a period when prisons' practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons." *Wolff v. McDonnell,* 418 U.S. 539, 569 (1974).

The admonition of Chief Justice Burger in *Wheeler v. Montgomery,* 397 U.S. 280, 284 (1970) (Dissenting Opinion), is relevant to this action:

> "I can share the impatience of all who seek instant solutions, there is a great temptation in this area to frame remedies that seem fair and can be mandated forthwith as against administrative or congressional action that calls for careful and extended study. That is though too slow. But, however cumbersome or glacial, this is the procedure the Constitution contemplated."

CONCLUSION

Amicus submits that a person convicted of a crime and committed to state prison has no liberty or property interest in remaining in a particular institution. The formulation of standards and procedures for movement of inmates from one institution to another is a matter to be determined by state correctional officials.

Dated, San Francisco, California,
August 29, 1975.

Respectfully submitted

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(Appendices Follow)

APPENDIX

Appendix A

INMATE CLASSIFICATION MANUAL OF THE DEPARTMENT OF CORRECTIONS

Chapter IV, Institutional Organization of Classification

SECTION CL-IV-03, CLASSIFICATION COMMITTEES: GENERAL CONSIDERATIONS.

A. *General Procedures*

1. The committee will use the central file, information presented by the inmate, and any pertinent reports available.
2. The inmate will make a personal appearance before the committee when feasible to participate fully and present a personal point of view or submit documents bearing on the proposed committee action. The reasons for any non-appearance will be documented.
3. A CDC Form 128-G will be prepared and a copy given the inmate in conformance with casework information validity and confidentiality procedures.
4. Committee decisions will be reached through group discussion and agreement. Subcommittees will refer cases in which agreement cannot be reached to the next higher committee.
5. The committee is to notify the inmate and relevant institution personnel of actions taken.
6. The warden/superintendent can defer actions of the committee if the safety of the institution requires this.

B. *Fairness Procedures*

Classification actions that result in a substantial adverse alteration of an inmate's condition of confinement will require the following procedures:

1. Written notice of the proposed action and the reasons for it will be given to the inmate at least 24 hours before the classification hearing when it is known in advance that the proposal is for an action which is adverse to the inmate.
2. A delay of at least 24 hours in the classification hearing will be granted upon the inmate's request when an unanticipated adverse classification action is proposed in the course of a classification hearing. The inmate will be given the required written statement and 24-hour notice.
3. When the classification committee determines that an inmate is unable to prepare a defense against the proposed action, or the situation is complex, the matter will be referred to the inmate's caseworker or to an investigating officer for assistance.
4. Emergency lockups and transfers will not require advance notice but inmates must have full opportunity to present their side at the classification meeting following the action. The reasons for the emergency action will be given to the inmate in writing as soon as

possible after the action was taken and before his or her appearance at the hearing.

5. The inmate may give up his or her right to 24 hours notice. Such a waiver will be documented.

C. *Definitions of "Substantial Adverse Effect"*

Actions having a substantial adverse effect on conditions of confinement are defined as follows:

1. Transfer to another institution for the purpose of providing more restrictive custody.
2. Increase in custody level.
3. Involuntary assignment to a security housing unit by a classification committee.
4. Involuntary removal from a program by classification committee action.

These actions may be taken on a temporary emergency basis when necessary without prior notification.

When taken at the Reception Center, these actions are not considered to have a substantial adverse effect on an inmate's condition of confinement.

D. *Form of Notice*

Means of notification of a proposed adverse classification action will be by copy of a CDC Form 128-B, which may be preprinted in part or entirely handwritten:

NOTICE OF CLASSIFICATION HEARING

Inmate ..... Date.....

You will appear before a classification committee on ..... for consideration of a major program change as follows:

Transfer ..... Increase in Cutody.....

Assignment to Security Housing .....

Removel From Program .....

Other .....

Reasons:

.....

Staff Name and Title

Orig. to Class. Comm.
cc to Inmate

The CDC Form 128-B can be initiated by any designated employee but would be prepared typically by the employee who is referring the inmate to the committee.

E. *Effect of Unresolved Disciplinary Proceedings*

When the reasons for the proposed classification action include matters which are the subject of an unresolved disciplinary charge, a copy of the CDC Form 115 will be attached to the CDC Form 128-B. The "reasons" section of the CDC Form 128-B may incorporate the information contained in the CDC Form 115 by a cross reference. The classification committee may act, or may postpone action until the disciplinary

committee has acted. Until the disciplinary charge has been resolved, the facts stated in the CDC Form 115 will be assumed to be true, and the classification committee may consider the nature of the charges in reaching its decision.

F. *Effect of Completed Disciplinary Proceedings*

After resolution of disciplinary charges, the classification committee at its next regular meeting will review the disciplinary findings to determine whether further action is appropriate. If a further action with a substantial adverse effect is to be considered, a copy of the completed CDC Form 115 will be attached to the CDC Form 128-B. The "reasons" section of the notice form may incorporate the disciplinary information by a cross-reference as well as include any other reasons for considering the action. Any findings of the disciplinary committee will be accepted as true.

G. *General Composition of Classification Committees*

Because of the importance of the classification process and the key decisions which must be made, senior, experienced staff members will be assigned. Inexperienced staff members may be assigned on an in-service training basis but not to fulfill any of the major positions on the committee. For example, a correctional sergeant might be assigned to a committee but only in

addition to the higher custodial representative ordinarily present.

The following manual sections contain suggested compositions for the various classification committees. Logical alternate members have been listed for each committee in brackets following the primary members.

Unless specifically stated, the listed committee composition is not mandatory but may be adjusted to fit the particular needs of individual institutions. The composition of each institution classification committee will be approved by the Director as part of the institution classification plan (CL-IV-01.)

All CDC 128-G's reflecting a committee action for transfer recommendation should be signed by the program administrator responsible for the unit housing the inmate or the chairman of the committee recommending the transfer (this is usually at the program administrator level or higher per established policy.)

In the absence of the program administrator or the chairman of the committee, another member of the committee will be designated to sign or initial the CDC 128-G recommending transfer.

Appendix B

INMATE CLASSIFICATION MANUAL OF THE DEPARTMENT OF CORRECTIONS

Chapter VI, General Transfer Procedures

CL-VI-00 INTRODUCTION

This chapter contains policies and procedures relating to the transfer of adult male offenders, under circumstances that are generally routine. Under the provision of Section 5079 and 5080 of the Penal Code, all transfer actions are the responsibility of the Director of Corrections, the detail of which he may delegate to certain staff members as outlined in this Manual.

CL-VI-01 RECEPTION-GUIDANCE CENTERS, CLASSIFICATION AND TRANSFER POLICIES

The Superintendents of institutions under the juisdiction of the Director of Corrections in which Reception-Guidance Centers are located have full administrative responsibility for the operation of such facilities. Each of the Associate Superintendents in charge of these Reception-Guidance Centers is directly responsible to the institutional head in all matters pertaining to the operation of his unit. He shall report directly to the Superintendent in the same manner as do other Associate Superintendents or heads of major institutional divisions.

The Deputy Director, Program and Staff Services and the employees under his supervision

serve in a staff capacity as members of the Director's staff. The Deputy Director, Program and Staff Services gives technical supervision to the clinical studies of inmates in the Reception-Guidance Centers in the same manner that he and other members of his staff give technical supervision to all phases of the classification and treatment programs in the institutions.

Notwithstanding the authority delegated to the Departmental Classification Staff in the foregoing sections to issue instructions for transfers and to place inmates on eligible lists, it shall be the duty of each member of the Departmental Classification Staff to withhold approval and to transmit to the Director any recommendation which in his judgment is a matter for policy determination.

CL-VI-02 TRANSFERS FROM RECEPTION-GUIDANCE CENTERS REQUIRING CLASSIFICATION STAFF REVIEW

Inmates recommended for transfer by the Reception-Guidance Center staff to the following institutions:

California Correctional Institution
California Institution for Men
California Medical Facility
California Mens Colony
California Rehabilitation Center Work Crew
Correctional Training Facility—North
Deuel Vocational Institution
Reception-Guidance Center Work Crew—CIM, CMF, CVI

California Conservation Center
Southern Conservation Center
Sierra Conservation Center

will be presented to a Classification Staff Representative. He shall review the entire file and consider the summary in the light of available information to determine its adequacy for the use of Adult Authority and institutional personnel. If the summary is considered adequate and the recommendations are consistent with Departmental policy, the Classification Staff Representative will place the inmate on Transfer Order CDC Form 246. The placement of an inmate's name on a CDC-246, Transfer Order, by a Classification Staff Representative shall constitute The Director's approval of the program recommended by the Reception-Guidance Center Staff, as required by Penal Code Section 5079. If the summary contains remediable deficiencies, the file is returned to the responsible Reception-Guidance Center staff member for correction. If staff recommendations are considered inappropriate or not feasible, the Classification Staff Representative will enter his proposed modification in a supplemental entry to the Cumulative Case Summary indicating his reasons. The proposal will be made available to the Associate Superintendent, Reception-Guidance Center, for his information and review. If he disagrees with the proposed change, he is authorized to defer movement of the inmate pending notification of the Chief,

Classification Services. All other transfers, as approved by the Classification Staff, are moved on the first available transportation. Transfers from the Reception-Guidance Centers receive first priority on Departmental transportation and institutional space.

CL-VI-03 Transfer From Reception-Guidance Center—Associate Superintendent Review

Inmates recommended by the Reception-Guidance Center staff for transfer to the following institutions:

Folsom
San Quentin
Correctional Training Facility—Central

will be presented to the Associate Superintendent, Reception-Guidance Center for his review. He will follow the general procedures outlined above, reviewing each case carefully for its adequacy for use of the Adult Authority and institution personnel. Those transfers which he is willing to approve, will be placed on Transfer Orders CDC Form 246. The placement of an inmate's name on a CDC Form 246, Transfer Order, by an Associate Superintendent shall constitute the Director's approval of the program recommended by the Reception-Guidance Center staff, as required by Penal Code Section 5079. The Associate Superintendent has the responsibility to bring to the attention of his staff incomplete or inadequate casework.

It is reasonable to expect that the Associate Superintendents will not personally review each Reception-Guidance Center case. The responsibility for the review and for conformance with Departmental policies and procedures remains with the Associate Superintendent. The Associate Superintendent / Superintendent will sign all Transfer Orders.

In cases which pose particularly difficult placement or management problems, or where the designation is as a special case, the Associate Superintendent will present the case to a Classification Staff Representative.

The Associate Superintendent in his review also has the responsibility of modifying transfer recommendations in line with Departmental population needs, work crew needs and other specialized problems.

CL-VI-04 Processing of Transfer Orders (CDC Form 246)

After the cases have been listed on the CDC 246 (Transfer Order), the CDC 246 will be signed at the top by the Associate Superintendent. Authority to sign the 246 may be delegated to the Correctional Counselor III or to the Reception-Guidance Center Records Officer. Cases reviewed and approved by the Associate Superintendent Reception-Guidance Center will be signed at the bottom by him for the Director of Corrections. Transfer Orders listing cases reviewed by a

Classification Staff Representative, will be signed by the Classification Staff Representative for the Director of Corrections.

Following signature, the two copies of CDC 246 will be distributed as follows:

Original: To the Departmental Records Officer.

Duplicate: To the Associate Superintendent/Superintendent of the institution where the Reception-Guidance Center is located. This copy will be retained only until all inmates listed have been transferred.

Transfer orders and eligible lists emanating from Central Office will be processed and distributed by the Departmental Classification staff.

Whenever Transfer Orders (CDC 246) or Eligible lists (CDC 255, 256-A, 256-B) are changed by addition, deletion, or corrections, the Departmental Classification staff member approving the order will initial each such modification. All blank space on the above forms is to be lined through in such a manner as to prevent the possibility of names being added after the Departmental Classification staff member has signed the order.

Retention of Inmates in the Reception Centers and Institutions after Case Completion

It is of prime importance that cases do not remain in the Reception Centers more than two weeks after completion while awaiting transportation. The Reception Centers, therefore, are to report on a weekly basis to the Chief, Classification Services, Central Office, on all cases that have been in the Reception Center longer than two weeks after the signing of the transfer orders by the Classification Staff Representative. Institutional Records Officers are to report likewise on all cases awaiting transfer longer than four weeks.

This should be done on the regular weekly population teletype indicating the number of cases by institution approved for transfer. Where transfer is delayed by virtue of Departmental Review Board referral, the case also should be listed by name and number and designated as Departmental Review Board.

CL-VI-05 Parole Violators

In general, parole violators are classified and transferred in the same manner as new commitments. At the time of reception, however, they may be processed selectively in accordance with the provisions of the Cumulative Case Summary Manual, CS-VII-08. Selective processing is feasible because of the large amount of information already available on many parole violators, combined with evidence that little or no significant change has occured since the previous evaluation. Many parole violators will have had prior minimum custody experience. They may be recommended either for return to a minimum custody situation or for early minimum or camp placement. Where case factors indicate that a parole

violator with a new commitment is likely to serve a lengthy sentence, he should not be initially transferred to a minimum custody institution.

Parole Violators with New Terms

Parole violators with new terms (PV-WNT) will be processed at the SRC*, with the exception of certain medical or psychiatric cases which may require placement at California Medical Facility. Temporary case overload at SRC may on occasion be transferred to Northern Reception Center (NRC) for PV/WNT processing. Those routinely at other institutions will be transferred to SRC.

Parole Violators to Finish Term

Parole Violators to Finish Term (PV-TFT) from Parole and Community Services, Region I and Region II will be processed at San Quentin New Process Unit (NPU); Parole and Community Services, Region III and Region IV at CIM-Reception Center West (RCW). The latter (RCW process cases) will be delivered to CIM-RCW and SRC will maintain approximately 60 beds for those requiring close custody during their processing at RCW.

In both units PV-TFT will receive case work services from inside-outside parole agents and auxiliary staff assigned to the RCW in accordance with established procedures.

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*Southern Reception Center

Following the diagnostic work-up, PV-TFT will appear before the Adult Authority for parole revocation hearing. If parole is revoked and a new parole release date of six months or *less* from the date of the hearing is granted, the PV-TFT will remain in RCW for post-board classification action and a short-term program (STP). Those who are placed on an Adult Authority rehearing calendar *more* than 6 months from the date of the revocation hearing, or who are denied a release date, will be recommended by the post-board classification committe for transfer to a CDC facility where their custody and program needs may best be met.

The parole processing units at CIM-RCW and San Quentin are also designated as Controlled Substance Treatment Units (CSTU-Health & Safety Code, Section 11560 and 11561), processing non-suspended PV's formerly designated NTCU.

Those returned from Parole and Community Services, Regions I and II will be processed at San Quentin those returned from Parole and Community Services, Regions III and IV will be processed at CIM. The former will be received directly at San Quentin and processed by a designated NPU staff member. The latter, from Regions III and IV will be delivered to SRC for initial custody screening prior to transfer to RCW-CSTU. Processing will include initial interview, advising the parolee of his legal status and discussion of his housing and program. The

release program will be prepared and presented to the Parole and Community Services agent for presentation to the Adult Authority.

Pick Up by Departmental Bus

Arrangement for the Departmental bus to pick up technical parole violators at county jails located along the normal routes may be made by the Chief, Parole and Community Services Division, in conjunction with the Chief, Classification Services. Such parole violators will be immediately transferred to either the SRC or San Quentin, depending upon the Parole and Community Services region of parole assignment.

Disposition of Ill Parole Violators

Parole violators who are suffering from tuberculosis may be sent to San Quentin; parole violators who are acutely mentally ill may be sent directly to the Medical Facility; or, when requested by the Adult Authority, parole violators requiring special diagnosis and treatment available only at a specific institution, may be delivered directly to that institution after clearance with the Chief, Parole and Community Services Division and on approval by the Director. A copy of the order directing the parole violator's return, a report which includes the medical needs and recommendations and a cumulative case summary with photograph will be delivered with the parole violator.

Limitations on Return of Parolees

A parolee may be returned to an institution of the Department of Corrections for temporary emergency medical attention without his parole being suspended, cancelled, or revoked. Acceptance of such cases shall be at the discretion of the Warden/Superintendent or his delegate upon the request of an authorized parole agent with the concurrence of his supervisor.

Whenever possible, requests and transfers will be made during a normal work day when medical staff are on duty. When it is necessary to effect a move during other than normal times, i.e., nights, weekends, holidays, approval for the acceptance of a parolee will rest with the administrative officer of the day or medical officer of the day in institutions that maintain staff medical officers on a 24-hour basis. The duty officer who approves an emergency move will be responsible for a follow-up notification to the institution Classification and Parole Representative on the next work day, for purposes of attaining necessary records and to insure the case will be brought to the Adult Authority's attention at their next scheduled meeting. When the parolee reaches the stage of medical clearance, the Classification and Parole Representative of the holding institution will notify the district parole agent to effect a removal from the institution by a reinstatement on parole or other appropriate action as stipulated on the initial order placing him in the institution.

A parolee may be returned to an institution of the Department of Corrections for temporary psychiatric attention under non-suspended conditions. Such a transfer must be coordinated by the regional Morrissey-Gagnon coordinator (Parole Agent II) and the receiving institution Warden/Superintendent or his delegate. The physical transfer of a parolee shall be warranted only after a "placement hearing" has been conducted in the community by the Adult Authority, whereas conclusions have been documented that a return for psychiatric attention is ordered. A parolee may waive his placement hearing making action for the Adult Authority valid without a formal hearing.

Prior to physical transfer of the parolee, the regional coordinator (Parole Agent II) will provide the receiving institution with copies of the field parole agent's report relating to the behavioral aspects of the parolee which drew attention to the need for psychiatric attention, the psychiatric report completed by the out-patient clinic and the placement hearing results endorsed by the Adult Authority (CDC 266-G).

Parolees returned for psychiatric reasons to a CDC institution may be confined for a period of up to 90 days without suspension of parole. Whenever the parolee's psychiatric condition warrants, he will be re-paroled within a period of 90 days without further Board action. Institution staff will process the case in accordance with standard RUAPP procedures. If his psychiatric condition does not warrant re-parole, he will be scheduled for a full revocation hearing at the institution prior to the expiration of the 90 day period.

A parolee returned for psychiatric attention may be returned at times and days other than normal institutional work days if prior agreement with the delegated staff member who handles such cases is made.

Disposition of Parolees Surrendering at Institution

When an individual identifying himself as a parole violator arrives at the entrance of an institution and requests admittance, he shall be interview by a staff member, preferably a correctional counselor. Facts concerning his original offense, length of time on parole, criminal or technical violation while on parole and reason for the surrender shall be determined. The correctional counselor should ascertain that the person is a parolee by referring to institutional records or by contacting one of the following:

1. Identification Unit
   Room 579, 714 "P" Street
   Sacramento
2. The unit office of the Parole and Community Services Division under which the individual was supervised.
3. The parole regional office having jurisdiction over the district office.

The sheriff, or if more convenient, the chief of police of the nearest city, shall be notified and requested to take the parolee into custody pending disposition by the Parole and Community Services Division.

The parole agent supervising the area in which the institution is located shall be immediately notified and given all available information.

Short-Term Return

Since the institutional stay of a short-term return case may vary from one to six months, institutional programming to effect attitudinal or behavioral changes will normally not receive first priority. Many of these cases can be programmed by a demanding work situation coupled with frequent group sessions focused on reasons for the parole failure. Other cases, of course, will call for family counseling, Alcoholics Anonymous, and in some cases, brush-up courses in vocational training, etc., depending on the needs of individual cases.

The reinstatement of these cases on parole will depend, in part, on the adjustment in the short-term return status and party upon circumstances in the community as defined by the parole agent. Consequently, the decision to submit for reinstatement upon parole will be a joint decision by the parole agent and institutional staff.

Eligibility

PV-TFT cases are eligible for short-term return consideration except for the following:

A. Cases where the parole behavior included violence or threat of violence and there is a prior history of violence.

B. Cases where there was significant narcotic involvement, either during the current parole or in the criminal record of the past several years. CSTU is the preferred place for these cases.

C. All cases requiring psychiatric review and report prior to release.

D. All cases where there is evidence or strong suspicion that a major felony was committed during the current violation episode.

I. *Report Preparation*

A. Records Officers working with NPU staff will be responsible for updating the legal aspects of the case.

B. RCW staff at CIM and NPU Staff at San Quentin will handle all short-term return cases. Responsibilities are as follows:

1. Revise and update the case summary sheet in accordance with CS-XI of the Cumulative Case Summary Manual.

2. Serve the inmate with his parole violation charges.

3. Advise the inmate of his rights under provisions of the Supreme Court decisions, *Morrissey vs. Brewer* and *Gagnon vs. Scarpelli.*
4. Prepare a staff evaluation and recommendation page. This report should evaluate the reasons for the parole violation and speak to *realistic* programs that will assist the inmate in a rapid return to parole.
5. Institutions are encouraged to develop short-term work programs and other assignments that would approximate the inmate's employment pattern while on parole, e. g., service station attendant, cook, window washer, etc.

II. *Parole Violation Hearing at the Institutions*

At the earliest practical scheduled Adult Authority calendar the inmate will appear for consideration and determination of charges at a parole violation hearing (PV-TFT have the right to request an attorney and witnesses to appear in their behalf at their revocation hearings before the Adult Authority). Case factors will determine one of the following decisions:

A. Release Upon Approved Parole Plan (RUAPP) re-parole upon establishment of a parole program.

B. Receive a reparole date of six (6) months or less; in which case he will, in most cases, be assigned by the NPU post-Board classification committee to a short-term program at either San Quentin or CIM.

C. Receive a reparoie date or rehearing date of six (6) months or more; in which case he will be recommended for transfer to an appropriate CDC facility by the NPU post-board classification committee.

III. *Removal from NPU*

While removal from NPU is contingent entirely on inmate's behavior and adjustment in the unit, if an inmate is found to be unsuitable for the program, the case will be referred to the Adult Authority on the Special Proceedings Calendar. If term of inmate has been fixed and parole granted, procedures in accordance with the Staff Representatives Manual (SR-5-02) will be followed.

If inmate is transferred out of unit for security or disciplinary reasons, the staff will forward details and documentation to receiving institution for Adult Authority Special Proceedings Calendar review. The NPU classification committee will effect case transfers.

IV. *Program Measurement*

The Research Division, in consultation with NPU administrative staff, will devise a system to evaluate the NPU program.

CL-VI-06 Transfer Between Institutions—Classification Staff Review

When the transfer of inmates between institutions is deemed necessary, a classification committee recommendation for transfer will be submitted to a Classification Staff Representative on chrono form CDC 128-G. In order for a Classification Staff Representative and receiving institution staff to understand the reason(s) for transfer, the CDC 128-G transfer chrono should contain the following elements:

a) Current custody, housing and program.

b) Date of next Board appearance. If Board date is not applicable because of a granted parole and/or discharge date, the release date should be shown.

c) Identity of the classification committee recommending the transfer.

d) Reason(s) for transfer recommendation.

e) Institution to which a transfer is recommended. If an alternate institution is proposed, give the order of transfer priority.

f) When applicable, the name, number and current location of enemies.

g) When applicable, indicate if subject is on a regime of tranquilizers.

h) A proposed program for the guidance of the receiving institution. This may include suggestions for custody, work assignment and training.

The above elements are intended as a working guide for an institutional classification committee in preparing the transfer chrono. Ideally, the review of the transfer chrono should give the Classification Staff Representatives sufficient information for a decision. There should be no need for the Classification Staff Representative to refer or be referred to other chronos, memos or other documentation to complete his review. The mention of unavailable, confidential information as a rationale for transfer should be avoided and will be deemed as unacceptable information by the reviewing Classification Staff Representative. At times, in marginal cases, where there appears to be serious doubt as to the receiving institution's ability to readily place an inmate in a recommended program, work crew assignment or general population (when indicated), communication between institutions can be helpful in clarifying matters prior to Classification Staff review.

Sample Transfer Chrono

No. B-000 Name Jones October 1968 AA

Custody: Minimum *Recommend CIM*

Assignment: Academic/Farm Crew

Comments: Jones will complete his elementary education requirements by June 1968. He will, therefore, become eligible for specialized farm training (tractor driving). Transfer recommendation is made for CIM where Jones can continue his release preparation training. CIM staff aware of situation and are willing to place Jones in the recommended program.

Date: May 10, 1968 Unit I Re-Classification

CDC-128-G (23512) 1st.: San Quentin

After review of the inmate's file, the Classification Staff Representative will initial the chrono form CDC-128-G in all cases of those recommendations he is willing to approve. All cases approved for transfer are placed on Transfer Orders (CDC-246). Where he is unwilling to approve the recommendation or wishes to propose a modification, he will prepare a chrono form (CDC-128-G) containing the following elements:

a) Reasons for disapproval and proposed modification.

b) Suggested alternatives to the classification committee's proposal.

If the disapproval or proposed modification is not accepted by the classification committee or its designated representative, referral may be made to the Chief, Classification Services, by the committee. Such referrals shall be in the form of a complete statement of the situation taking into consideration the views of the Classification Staff Representative. If the Chief, Classification Services, concurs with the classification committee, he may order the proposed transfer. If he does not concur, he may submit the case to the Departmental Review Board; or a report may be returned to the classification committee detailing the reasons for rejection. The classification committee may then with the approval of the Warden/Superintendent submit the case to the Departmental Review Board.

CDC 246 (Transfer Order) will be handled in the same way as in Section CL-VI-04.

Transfers within Sixty Days of Release or Board Dates

Except in emergency situations or transfers to special units, inmates will not be transferred within 60 days of release date or within 60 days from the first of the month of their board date: e.g., a man with a December Adult Authority appearance would not be moved after the thirtieth of September.

If transfer is judged to be necessary because of emergency situation or placement in a special unit within the 60 days to a board appearance, then

the appropriate board report will be completed by the sending institution prior to transfer.

Particular emphasis is placed upon the importance of institution notifying the Adult Authority as early as possible of additions to monthly calendars. Appropriate estimates should be used to avoid late and large additions of cases.

Warden/Superintendent Halting a Transfer

Where the Warden or Superintendent believes that due to health conditions or other emergency reasons an inmate should not proceed on scheduled transfer, he may remove such an inmate from the bus and hold him at the institution. The reason for such action will be reported by letter to the Director of Corrections. If the Warden or Superintendent also believes that the transfer order previously issued on the inmate be rescinded, then such statement, with reasons, will be given.

Delays in Transfer

When an inmate has been approved for transfer, movement to the transfer institution should be effected without delay. If transfer has not occurred within thirty days after approval, the sending institution will submit a report to the Chief, Classification Services, setting forth the date of the approval and the primary reason for the delay. Special transfer consideration such as *work crew, Adjustment Center, psychiatric treatment,* will be indicated as needed. Upon receipt of such notification, the Chief, Classification Services, will issue instructions to the sending institution to make the indicated movement, to rescind the transfer order, or to submit an alternative transfer recommendation.

CL-VI-07 Transfers to Conservation Camps—Joint Classification Committee Review

Only institutions which are operating conservation camps may process inmates directly for camp (CL-XV-05). Where a classification committee desires to prepare the assignment of an inmate to a camp program, recommendation for inter-institutional transfer shall be made in accordance with CL-VI-06 indicating conservation center placement or in the case of Camp Cuesta, CMC-West transfer.

When an institution has been instructed by the Chief, Classification Services to furnish inmates for the conservation program, a joint classification committee meeting may be arranged with the participation of a Classification Staff Representative to select inmates for such an assignment.

The joint classification committee recommendations for the assignment to the conservation program will be submitted to the Classification Staff Representative on a chrono form CDC-128-G. The chrono will contain the following elements:

a) Inmate's qualifications for the conservation program.

b) Statement of medical and dental clearance.

c) The next Adult Authority appearance. If a parole or discharge date has been granted, the date of release.

d) Reconciliation of any apparent contraindications to conservation placement.

On review, the Classification Staff Representative shall initial the chrono form CDC-128-G in the cases of those inmates whose assignment to the conservation program he is willing to approve. If he is unwilling to approve, he shall so indicate in a supplemental chrono entry. Such entries must contain the following elements:

a) Reasons for disapproval.

b) Suggested alternatives.

If the classification committee is unwilling to accept the disapproval of the Classification Staff Representative, referral of the entire situation to the Chief, Classification Services may be made. The Chief, Classification Services may authorize the assignment if he agrees with the classification committee or may submit the case to the Departmental Review Board for a recommendation to the Director.

CL-VI-08 TRANSFER TO CONSERVATION CENTER CAMPS SUPERINTENDENT/ASSOCIATE SUPERINTENDENT REVIEW

The classification committees of the Conservation Centers shall submit to the Superintendent/Associate Superintendent men recommended for assignment to a conservation camp. The Superintendent/Associate Superintendent is responsible for the review of the records and for approval of these men designated for camp placement. He will delete names of men he is unwilling to approve.

Men thus approved will be listed on CDC Form 256-A and signed by the Superintendent/Associate Superintendent for the Director of Corrections.

CDC Form 256-A (Camp Transfers) will be distributed as follows:

Original—To Departmental Records Officer for permanent file in Central Office records section. The Departmental Records Officer will post the CDC 256-A list to CDC-149, Central Office inmate record card.

Duplicate—To the Warden/Superintendent of the institution from which the men are to be assigned. This copy needs to be retained only as long as the list is effective.

CL-VI-09 INMATES ASSIGNED TO INSTITUTIONAL WORK CREWS

The appropriate assignment of skilled inmates to work crews at the various institutions will be co-

ordinated by the Departmental Classification Staff. Inmates transferred to a particular institution for use in specialized work crew categories will be used in their appropriate skills. If inmates are not used in their appropriate skills as indicated at the time of transfer, they will be presented to the Departmental Classification Staff for consideration for transfer to an institution needing such skills. If an institution wishes to retain a work crew inmate, even though his specialized skills are not being utilized, they should present such cases to the Classification Staff Representative for his evaluation.

Inmates who have practiced medicine, including psychiatry or dentistry, as doctors prior to incarceration will not be assigned to hospitals or laboratories where their prior knowledge and skill can be manipulated by other inmates to the detriment of the program. However, with special approval of the Superintendent, after considering all factors, it is possible for them to be assigned to the hospital or laboratory where their skills can be utilized to benefit all concerned.

CL-VI-10 TEMPORARY COMMUNITY RELEASE

Inmates may leave departmental institutions for approved purposes only after such leaves have been approved in writing by the institutional head or administrator at a level no lower than Correctional Administrator, to whom such authority has been delegated by the institution head.

Leave will be authorized for a period no longer than necessary to accomplish the stated and approved purpose(s). The maximum limit of three days authorized by California Penal Code Section 2690 as amended, effective January 1, 1972, is strictly interpreted as 72 hours and is counted from time of departure from the institution to time of return to that institution. Under statutory limitations, no extension of time may be legally granted. All travel routes, destinations and terminals must be within the state.

Temporary Community Releases may be approved for the following:

A. *Family Emergencies (immediate family only)*

Defined as emergency leave requests are those involving a funeral, a bedside visit to a critically ill member, or a court hearing concerning a dependent child where inmate's presence has been requested by an official agency.

1. Upon receipt of a court order directing temporary release for an inmate for funeral attendance or other purpose not directly related to a criminal court proceeding, the institution will immediately contact the office of the Deputy Director, Program and Policy, for final approval.
2. The need for such leave will be verified by the institution head or his delegate by contact with the funeral director, attending physician, court officials or other appropriate

sources. Departmental field services may be requested to assist in verification.

B. *Pre-Release Planning Leaves*

This type of leave is primarily for those with established parole dates, but inmates with discharge date may be eligible if approved by an administrator for acceptance into his community correctional center; (See PR-V). Leave requests may be initiated by either parole or institutional staff, but must be concurred in by both. Expenses of the leave must be borne by the inmate. Leave may be authorized for the following purposes.

1. Employment interviews.
2. Making residential arrangements.
3. Taking employment examinations.
4. Obtaining necessary licenses.
5. Registering in an academic or vocational program to commence after established release date.
6. Handling business matters related to reentry obstacles.

The following inmate categories are ineligible for temporary community release:

1. Those serving sentence of Life Without Possibility of Parole.
2. Those who are considered by the institution head to be serious custody risks, i.e.,

potential escapees, makers of verified threats (to victims, witnesses, family members, staff or other officials), or those who exhibit a continuing pattern of aggressive behavior.

3. Wards of the Departments of Health and the California Youth Authority.
4. Out-of-state prisoners, pre-sentence diagnostic cases or safekeeping prisoners.
5. Federal prisoners who do not have minimum custody.
6. Not generally considered for temporary community release, but may be granted under escort after individual appraisals are:
   a. Psychiatric cases documented by the chief psychiatrist as not a menace to others.
   b. Security segregation cases carefully evaluated by the institution head as in protective custody for self-protection only.
   c. Inmates with detainer or holds filed against them.
   d. Inmates identified with large-scale organized crime, with notorious crimes of violence or whose presence in the community is deemed likely to evoke adverse reactions toward the state or toward himself.

e. Sex offenders.

f. Inmates classified as other than minimum custody.

g. Inmates with minimum parole eligibility of seven or more years will be considered for funerals only.

h. Lack of funds or escort personnel may also be a basis for denial of leave.

Prior to requesting and/or obtaining the authorization for temporary community release, a detailed leave plan will be prepared (by the Classification and Parole Representative) on the proper form, CDC 1549. This plan will include the purpose of the proposed trip, the destination, travel arrangements (bus, plane, train, state car, etc.), phone number(s) and address(es) where the inmate may be contacted at all times, a budget explaining costs and the inmate's signature indicating acceptance of the "Conditions of Temporary Release". This inclusive information will be submitted as early as possible to permit verification and communication with field personnel where required. Prior to the inmate's departure, the Regional Parole Administrator will be notified.

Institutions will maintain chronological logs for temporary community releases, listing the inmate's name and number, date and time of departure, scheduled return and actual return.

Staff member making the entry will sign and date. Since leave expenses are borne by the inmate, including escort costs where necessary, he will sign a trust withdrawal authorization in the amount of anticipated expenses prior to his departure, if he has sufficient funds to his credit. Funds donated by family or friends may be deposited to this account and/or the expenses may be charged against pre-release funds.

Escorted leave will not be authorized in any situation under temporary community release in which weapons or restraint gear are required to maintain control or security. When escorted leave is authorized, the escorting employee(s) will be paid in accordance with current payroll requirements. Meals and other approved personal expenses will be reimbursed in accordance with Board of Control Rules and departmental policy. If escorted leave is volunteered, the employee is considered to be on duty for purposes of Workmen's Compensation and/or other employee protection and benefit.

In escort leaves, transportation will be via state vehicle or public transportation. If the inmate is unable to pay, and if escort is volunteered, a state vehicle may be provided. Escorted leaves exceeding one calendar day will be contingent upon official pre-arrangement for overnight lodging of the inmate in a departmental institution if convenient, or in an appropriate local jail. Costs will be reflected in the leave budget. Upon

his return, the inmate will be interviewed and the post-audit portion of CDC Form 1549 (Request for Temporary Community Release) will be completed within two working days.

63-0 Days

Leave for pre-release planning within 63 days of parole must be jointly approved at an institutional level no lower than a Correctional Administrator and by the involved parole unit supervisor. If either is absent, approval will be given only by the person formally designated in the acting capacity.

90-64 Days

In exceptional cases, i.e., taking scheduled civil service examinations, special types of employment interviews, college enrollment or examinations, etc., where it has been verified that the event will *not* be scheduled during the 63-0-day period or after release, leaves may be authorized for the period 90-64 days prior to scheduled release. This exceptional leave must be personally jointly approved at the institution head/Regional Parole Administrator level, and will be reported in writing, listing the reason(s) to the Field Representative, Re-Entry Program, P&CS Division.

Consecutive Leaves

In rare instances related to pre-release planning, a second, limited leave immediately consecutive

to the first may become necessary. A consecutive leave may not be granted until the preceding one has been completed by return of the inmate to departmental custody. Where the inmate's return to the institution is prevented by unavoidable circumstances, he must make face-to-face contact with a departmental employee *prior* to the specified termination time in order to legally complete the first leave by constructive return to custody. If the employee contacted face-to-face observes any reason for discontinuing the leave, he is to place the inmate into custody at the nearest facility. Consecutive leaves may be personally authorized only by joint agreement of the institution head and Regional Parole Administrator or at a higher level. Each such leave must be reported in writing, explaining the circumstances, to the Field Representative, Re-Entry Program, Parole and Community Services Division.

Safeguards Against Introduction of Contraband—All Categories

Each departmental unit will specify in its procedures the appropriate measures taken to prevent introduction of contraband upon return of the inmate from leave.

Failure to Return—All Categories

Inmates who fail to return from leave within the designated period will be charged with escape from the custody of the institution head. When

notified that an inmate's return at the appointed time is unavoidably delayed, the institution head will be responsible for having the inmate placed into custody at the nearest California Department of Corrections facility at the earliest possible time.

A memo of each such event noting the action taken and the result will be forwarded to the Field Representative, Institution Community Re-Entry Division, within one working day.

College Attendance—Temporary Community Release for the purpose of attending college classes is authorized by Section 2690 of the Penal Code, amended by Senate Bill 1376. Educational leaves granted under this section are to be personally approved by the Director.

CL-VI-11 TEMPORARY REMOVAL FROM INSTITUTIONS

Under California Penal Code Section 2690, the Director of Corrections may authorize the temporary removal under custody of any inmate for the following purposes:

A. *Off-reservation work detail*—Removal under custody for the purpose of employment in any work directly connected with the administration, management or maintenance of the institution. Names of inmates recommended for off-reservation work detail by the institution classification committee or sub-committee will be listed on CDC Form 255, ORWD, Eligible List, in duplicate and presented to the institution head for review. The institution head will delete those inmates he is unwilling to approve, and sign his approval for the remainder. A copy will be forwarded to the Chief Records Officer.

Approved inmates may leave the institution under supervision of an employee. California Youth Authority wards in adult institutions shall not be recommended by institution classification committees or subcommittees for off-reservation assignments. Authorization may be requested on CDC Form 255, but these temporary removals will be effective only upon the basis of blanket authorization by the Youth Authority instead of under Section 2690 of the Penal Code, and the wording on CDC Form 255 will be changed accordingly.

B. *Community Betterment and/or Delinquency Prevention Programs*—Participation is limited to one day only, under escort and not overnight. Selection of participants for these programs will be made by personnel assigned for that purpose. The intent of the program is neither to glorify the crime or the criminal nor to be negatively critical of the law and law enforcement agencies, but to orient communities to the consequences of delinquency and crime. Responsibility for the administration, supervision and evaluation of the program is that of the superinten-

dent/warden. Approval shall be made on a one-day basis only.

C. *Medical Treatment*

Inmates may be removed for medical or special psychiatric examination, diagnosis, treatment or medical research purposes. Each case shall be certified by the Chief Medical Officer of the institution where the inmate is housed, and removal may be under custody. The inmate may be required to reimburse the state in whole or in part for expenses incurred by the state for other than medical treatment. Approval may be given by the institution head upon recommendation by the institution's Chief Medical Officer. (X-reference—Section 345, Administrative Manual.)

Except in the case of medical treatment, such removal shall not be for a period longer than three days.

D. *Emergency Fire Fighting*

Each institution will maintain a list of men eligible for emergency fire fighting according to quotas periodically issued by the Director of Corrections.

The institution classification committee lists those men recommended for emergency fire fighting duty on CDC Form 256-B, Fire Fighting Eligible List, in duplicate. This list

is submitted to the Warden/Superintendent or Associate Warden/Superintendent designated for his review and approval. Names of men not approved will be deleted. The official designated will sign his approval on CDC Form 256-B.

The original of CDC Form 256-B will be transmitted to the Chief Records Officer for permanent file. The duplicate will be retained in the institution for as long as the list is effective.

Men approved for assignment to emergency fire fighting may leave the institution on the signed orders of the Warden/Superintendent. The Director is to be notified by teletype of each such departure.

CDC Form 254, Camp Descriptive Notice, and photos will be prepared for each man assigned to the emergency fire fighting crew and will be retained by the Officer in charge of the group for distribution in the event of escape.

CL-VI-12 EMERGENCY TRANSFERS

Emergency transfers of inmates may be requesed in the following situations:

Situation

Where the conduct of an inmate or a group of inmates is of such immediate danger to the se-

curity of the institution that transfer must take place without awaiting normal procedures.

Situation

Where the institution does not have detention facilities required to contain the behavior of the inmate(s).

Procedure

When the Warden/Superintendent is of the opinion that an emergency transfer be requested, a telephone or teletype request is directed to the Chief, Classification Services.

If the Chief, Classification Services concludes that policy questions or other consideration prevent his granting approval, he will immediately notify the Deputy Director, Program and Staff Services, the Chief Deputy Director, or the Director of Corrections, giving them a statement of the situation and request a decision.

Situation

Where the inmate is acutely psychotic and must have immediate hospitalization, institution facilities being inadequate for even temporary holding.

Procedure—Institutions

Acutely psychotic cases requiring the inpatient psychiatric services of CMF are to be referred by the Chief Medical Officer sending institution

to the Assistant Superintendent, Psychiatric Services, CMF, to ascertain if the latter institution has space and is in a position to provide the treatment required. If concurrence is gained, then the office of the Assistant Superintendent, Psychiatric Services, CMF, will arrange the transportation and then notify the office of the Chief, Classification Services.

Procedure—Reception-Guidance Centers

Acutely psychotic cases at the Reception-Guidance Centers requiring the inpatient psychiatric services of CMF are to be referred by the chief psychiatrists at the Southern Reception-Guidance Center and Northern Reception-Guidance Center and the staff psychiatrist at the DVI-RGC to the Assistant Superintendent, Psychiatric Services, CMF, to ascertain if the latter institution has space and is in a position to provide the treatment required. If concurrence is gained, then the office of the Assistant Superintendent, Psychiatric Services, CMF, will arrange the transportation and then notify the office of the Chief, Classification Services.

If sufficient information is available to complete the Reception-Guidance Center study, then the staffing page will include the transfer approval of the Chief, Classification Services for CMF "A".

If in the judgment of the Reception-Guidance Center administrator there is insufficient informa-

tion available to complete the study, then the following will occur:

At Northern RGC—Northern RGC staff will complete the case work-up with the staffing page reflecting the approval of the Chief, Classification Services for CMF "A".

At Southern RGC and DVI-RGC—Reception-Guidance Center staff will forward all available information to the Northern RGC. Northern RGC administrator will be responsible for the study completion. The staffing page will reflect the approval of the Chief, Classification Services for CMF "A".

Acutely psychotic inmates are to be transported by air or land ambulance or by a state passenger vehicle. The use of the departmental bus for the transportation of acutely psychotic shall be excluded from consideration.

Where a difference of medical opinion exists as to the proposed transfer, the matter will be referred to the Chief, Medical Services Division, Department of Corrections.

Situation

Where the inmate is in need of immediate medical or surgical care not available at the institution.

Procedure

Where the transfer is for emergency medical attention, the Chief Medical Officer, sending facility, shall contact the Chief Medical Officer,

receiving facility, to ascertain if the latter is in a position to provide the treatment required. If the reply is in the affirmative, this information shall be transmitted to the office of the Chief, Classification Services, by the sending institution via telephone or teletype, so that he can arrange for transportation. Most emergency medical transfers will be to San Quentin as the institution of choice.

Situation

Where the inmate is suffering from tuberculosis, or is suspected of having tuberculosis.

Procedure

The inmate will be transferred to San Quentin. If psychosis is also present, he will be transferred to CMF.

The situations described above are based on precedent and predictable. All possible situations requiring the immediacy of action and transfer from one institution to another cannot be predicted or need to be described. There is no substitute for good judgment and prompt action.

CL-VI-13 MEDICAL TRANSFERS—NON-EMERGENCY

Non-emergency medical transfer requests will be presented to a Classification Staff Representative as a recommendation of the institutional classification committee. A medical officer's report should be attached stating the relative seriousness of the

case; the period of time within which the transfer should be effected; the type of transportation necessary; whether an attendant is required; any medication or care necessary while enroute; and a statement that acceptance by the receiving Chief Medical Officer has been obtained. If the transfer appears to fall within departmental policy, the Classification Staff Representative will indicate his endorsement in the usual manner.

If the inmate is to be returned to the sending institution upon completion of medical procedures this will be noted on the CDC Form 246 by adding "and return" after the name of the receiving institution.

If the Classification Staff Representative feels he cannot act upon the transfer recommendation, he will forward his report to the Chief, Classification Services who will consult with the Chief, Medical Services to work out a transfer plan which the Chief Classification Services will transmit to the receiving institution.

Inmates transferred for medical reasons ordinarily will be admitted directly to the hospital at the receiving institution. When medical procedures are completed, the institution records officer will be notified so that arrangements may be made for the inmate's timely return to the institution of origin, if so indicated on the original transfer order. If automatic return has not been indicated, the records officer will refer the case to the institutional classification committee.

Inmates suffering from tuberculosis or suspected of having tuberculosis will be transferred to San Quentin. The foregoing procedures (CL-VI-12) will be followed where appropriate.

CL-VI-14 Departmental Ambulance

The Departmental air and land ambulance service will be staffed and under the supervision of the Superintendent of the California Medical Facility. Personnel assigned to the ambulance operation will be familiar with the provisions of the Administrative Manual governing the transportation of inmates and necessary procedures governing transportation of medical and psychiatric patients.

The scheduling and routing of the Departmental ambulance will be the responsibility of the Chief, Classification Services. All requests for the use of the ambulance will be directed to him. The ambulance will be used only in those cases where, in the opinion of the Chief Medical Officer, of the sending institution, such transportation is required. A Medical Technical Assistant will accompany the ambulance furnished either by the California Medical Facility or by the sending institution as per arrangement. Requests for ambulance use will include the custodial classification degree of violence and any other necessary information which may be useful to personnel operating the ambulance and receiving institution. In certain cases, it may be necessary to assign a cor-

rectional officer in addition to the Medical Technical Assistant.

The Departmental ambulance may be used in transporting inmates to a parole placement, or to return parolees to an institution when a medical statement is obtained indicating that this type of transportation is medically necessary. Such requests will be submitted to the Supervisor of Placement, Parole and Community Services Division.

A copy of the log of the Departmental ambulance will be forwarded to the Chief, Classification Services on the last day of each month by the California Medical Facility. A log of such transfers shall be kept by the Transportation Officer, Department of Corrections.

CL-VI-15 Suggested Programming and Transfer Request By The Adult Authority

When the Adult Authority recommends special programming and/or suggests a change in classification of an inmate, it is imperative that the institution involved take one or more of the following actions as quickly as administratively possible.

a. If within the purview of the institutional classification committee and a recommendation considered to be in the best interest of the inmate, comply with the recommendation.

b. If the request for change involves a transfer and/or otherwise requires headquarters staff review, refer for action.

c. If the request is not possible for any reason or there is possibly a better solution, communicate this to the Executive Officer of the Adult Authority *immediately.*

Under the provisions of Section 5080 Penal Code, the Adult Authority may request the Director of Corrections to transfer an inmate under his jurisdiction if such transfer is deemed advisable for the diagnosis and treatment of the inmate.

Notification to the Director is made by Form CDC 267 in triplicate, signed by two or more members of the Adult Authority. All copies of the request (Form 267) will be forwarded to the Chief, Classification Services for review and distribution except where the Adult Authority request is for placement of the inmate in the CMF diagnostic-observation unit. In this instance, institutional classification personnel will refer the case to the Assistant Superintendent, Psychiatric Services, CMF, following procedures outlined in CL-X-04-b, subsection (1), and subsection c.

When, in the opinion of the Chief, Classification Services, an Adult Authority request for transfer would not endanger security, he will forward one copy of the completed Form CDC 267 to the Administrative Officer, Adult Authority, for his information. A second copy will go into the in-

mate's file, and the third copy will be returned to the referring institution for filing in Central File Jacket. The institution will prepare a Form 246, Transfer Order, for the signature of a Classification Staff Representative.

When, in the opinion of the Chief, Classification Services, facilities for a transfer requested by the Adult Authority are not available or such transfer would endanger security, he shall refer the request with his comments to the Departmental Review Board. The Departmental Review Board shall prepare a recommendation, with reasons, for the consideration and decision of the Director. Formal notification of the Director's decision shall be transmitted on Form 267 as provided.

Adult Authority requests via CDC 267 for transfer to the CMF diagnostic-observation unit will be forwarded to the Assistant Superintendent, Psychiatric Services, CMF, for review pursuant to procedures outlined in CL-X-04-b, subsection (1), and subsection c. Upon approval, he will forward one copy to the Administrative Officer, Adult Authority, for his information. One copy will be transmitted to the Chief Records Officer, Central Office, for his information and one sent to the referring institution for inclusion in the inmate's Central File Jacket. Where the Assistant Superintendent, Psychiatric Services, is not in accord with the Adult Authority transfer request, he will forward all copies of CDC Form 267 to the Chief, Classification Services with attached documentation for evaluation by the Departmental Review Board. The Chief, Classification Services will notify the Adult Authority and the referring institution of the Director's final decision by routing of Form 267.

CL-VI-16 DISCIPLINARY TRANSFERS

Transfers of inmates for disciplinary reasons will be governed in accordance with the following principles:

1. All necessary actions in regard to the disciplinary infraction committed by the inmate will be taken by the appropriate officials of the institution to which he was assigned at the time of the infraction. This includes decisions as to punishment for the infraction, recommendations to the Adult Authority, and referral to the district attorney for possible prosecution in cases warranting this action.
2. When the inmate is transferred to another institution prior to review of the disciplinary infraction by the Adult Authority (See Administrative Manual Section 320.05011), the disciplinary report will be forwarded to the receiving institution, Attention: Correctional Counselor III, for presentation to the Adult Authority on their next special proceedings calendar.
3. No inmate serving punishment for disciplinary infraction will be transferred to another institution until the disciplinary sentence has

been carried out, suspended or otherwise disposed of.

CL-VI-17 MECHANICS OF TRANSFERS

Inter-Institutional Transfers

After distribution of the CDC-246 as in CL-VI-04, the transferring institution will notify the receiving institution of the number of men being transferred and the date of transfer.

The Transportation Officer will sign for the inmates, their records and personal property entrusted to him.

CDC 143

Property Transfer Receipt will be prepared in triplicate for the signature of the Transportation Officer. One copy will be retained by the Property Officer of the sending institution. Two copies will accompany the Transportation Officer, one to be retained by the receiving institution, and the other retained by the officer following acknowledgement thereon by the receiving institution of receipt of the property listed.

Conservation Camp Transfers

Men approved for camp may leave the institution on the signed order of the Warden/Superintendent. The Transportation Officer will sign for the inmates and their property on CDC 143, Property Transfer Receipt.

CDC 253

Camp Assignment Card will be prepared in quadruplicate on each man assigned to camp. Upon arrival at camp, distribution will be as follows:

One copy to camp supervisor's file.

One copy to cooperating agency.

One copy to sheriff of county in which camp is located.

One copy to sheriff of neighboring county if deemed desirable.

CDC 254

Camp Descriptive Notice and photos will be prepared (six copies) and kept in camp office for distribution in event of escape.

CL-VI-18 ADMINISTRATIVE TRANSFERS

Administrative transfers are those effected for the welfare and security of the institution. Transfers for administrative reasons are not always of an emergency nature, nor do they necessarily follow disciplinary action.

Administrative transfers may be recommended if the Warden/Superintendent of an institution concurs in the opinion of his staff that the transfer of specific individuals is necessary. In some cases, there will not be positive proof of involvement in dangerous activities, but there is sufficient information to indicate the high probability that serious difficulties or breaches of security will occur if transfer is not effected.

When administrative transfers are approved by the Classification Staff Representatives, over the telephone, a confirming teletype will be sent to the sending institution; copy to receiving institution. Classification Staff Representative will subsequently review all such transfers at the receiving institution.

Such transfers must be very carefully evaluated so as to avoid possibility of serious injustices to the inmates involved. In well managed institutions, the number of such transfers will be very small.

Administrative transfer requests for Departmental convenience will be frequently transmitted by the Chief, Classification Services. These requests will generally be of two kinds:

1. *Work Crew*—At small institutions, inmates qualified as craftsmen or technicians are required for many work assignments. Requests to fill such positions will be frequently directed to other institutions and Reception-Guidance Centers.
2. *Population Adjustments*—All institutions may from time to time be asked to absorb surplus population brought about by unusually heavy intake, shifting of special programs from one facility to another, deactivation of a particular institution and any other similar shifts in inmate population.

CL-VI-19 Removal of Inmates from Institutions in Case of Specified Types of Disasters

Section 1509.95, Military and Veterans Code, provides that the Warden/Superintendent may remove the inmates from his or her institution in the event of fire, flood, enemy attack, or other major disaster endangering their lives. If possible, the inmates shall be moved to a safe and convenient place and confined as long as may be necessary to avoid the danger. If this is not possible, the Warden/Superintendent may release them without being held liable, civilly or criminally, for acts performed pursuant to Section 1509.95 Military and Veterans Code.

Any of the acts described above shall, obviously, be performed only as a last resort. Where the Warden/Superintendent is of the opinion that such action is absolutely necessary, a telephone request shall be made to the Director of Corrections. If this is not possible, the Warden/Superintendent shall contact the Director by any means possible after the action has taken place and inform him of the circumstances and situation. Insofar as communications permit, he shall also alert local law enforcement agencies of the action taken and request any and all assistance available. In no case shall inmates be evacuated or released outright from the institution without every possible effort being made to insure the safety of the public to the extent possible.

CL-VI-20 EMERGENCY OFF-RESERVATION WORK CREWS

In accordance with CD-VI-00, in the event of a major disaster of enemy attack, the post-disaster programs of the communities surrounding the institutions of the Department of Corrections could be materially augmented by emergency crews of supervised inmates. Possible types of services could include: demolition and salvage, fire fighting, rescue, burial of dead, identification of dead and registration of refugees. Inmates classified for Emergency Fire Fighting and/or Off-Reservation Work Details may be also assigned to disaster relief teams by the designation of X after their custody classification; i.e., Min. BXOREFF.

Approvals for the quota increase of institution Emergency Fire Fighting or Off-Reservation Work Details will be authorized in accordance with established Departmental procedures.

The Conservation Division will be responsible for the development of an overall plan of operation covering all the conservation centers and camps of the Department of Corrections, including permanent, temporary and mobile units under civil defense and disaster conditions. The plan will include written agreement with the cooperating departments and divisions as to the planned use of inmate personnel during an emergency situation (CD-IV-04).

Appendix C

Administrative Information
and Statistics Section
Research and Planning Services
Policy and Planning Division

State of California
Health and Welfare Agency
Department of Corrections
August 19, 1975

MOVEMENT OF INSTITUTION POPULATION
BY EACH INSTITUTION
Fiscal Year 1974-75

Movement	Men Total males
Population 6-30-74	23,277
Total received	53,864
New admissions	6,797
Transferred from reception center	5,803
New admissions—felons	5,494
Parolees returned	309
Youth Authority	—
Transferred from other institutions	28,884
Regular	22,450
Civil narcotic addicts	3,134
Parolees returned	100
Overnight	3,200
County diagnostic cases received	2,975
Parolees and outpatients returned	3,587
Returned from court	4,402
Non-suspended parolees	584
Youth Authority	106
All other	726

Total released	54,204
Discharged	273
Paroled	6,355
To outpatient status	3,075
Transferred out of reception center	5,803
New admissions—felons	5,494
Parolees returned	309
Youth Authority	—
Transferred to other institutions	28,884
Regular	22,450
Civil narcotic addicts	3,134
Parolees returned	100
Overnight	3,200
County diagnostic cases discharged	2,982
Out to court	4,573
Non-suspended parolees	417
Youth Authority	142
All other	1,700
Population 6-30-75	22,937
Youth Authority wards total	28
Paroled	28
Discharged	—

[Transfers between camps of conservation centers excluded]

[Statistical breakdown of transfers of males by institution and all statistics for transfers of females omitted in printing]